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Supreme Court of the United States

OCTOBER TERM, 1972

No. ....

72-934

GERALD GORDON, as receiver of the rights and assets of Louis Porter,

Petitioner,

against

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No. ....

GERALD GORDON, as receiver of the rights and assets of Louis Porter,

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against

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Gerald Gordon, as receiver of the rights and assets of Louis Porter, prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the State of New York and the denial of a petition for a re-hearing which reversed a judgment entered in the New York State Supreme Court on April 10, 1970 in favor of the petitioner, as affirmed by the Appellate Division, Second Department on July 23, 1971 in the amount of $201,129.17, with interest from March 3, 1965.

Citations to Opinions Below

The opinions in the New York Court of Appeals appear at 30 NY2d 427, 337 NYS 2d 601 (1972). The opinions in the Appellate Division, 2nd Department, appear at 37 A.D.

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2d 265, 323 NYS 2d 550 (1971). The opinion of the trial court, on motion to set aside the verdict is reported at 62 Misc. 2d 689, 309 NYS 2d 420 (1970).

Jurisdiction

The final judgment of the New York Court of Appeals, dated June 1, 1972, reversing the jury verdict, the judgment of the trial court, and judgment of the Appellate Division in favor of the petitioner, and the order denying re-hearing, dated September 29, 1972, constituted determination by the highest State Court in which a decision could be had. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3) petitioner claiming rights and privileges under the fifth, seventh and fourteenth amendments to the United States Constitution.

Questions Presented

In the opinion of petitioner, the following questions are presented:

1) Whether the actions of the New York Court of Appeals in this case constituted State action in violation of petitioner's right to trial by jury and against re-examination of facts tried by the jury other than according to the rules of the Common Law under the Seventh Amendment to the United States Constitution and under the Fifth and Fourteenth Amendments against the taking of petitioner's property without due process of law.

2) Whether the actions of the New York Court of Appeals in this case violated petitioner's rights under the Fourteenth Amendment to the United States Constitution, Section I, by State action denying equal protection to poor but not insolvent citizens such as petitioner and depriving him of property without due process of law.

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Constitutional Provisions Involved

United States Constitution, Amendment V

No person shall be . . . deprived of life, liberty or property without due process of law. . . .

United States Constitution, Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment Fourteen, Section I

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

On August 11, 1961, Louis Porter entered into a premium finance agreement with one J. Donbarra (Exh. 16, R. 290-292). Pursuant to the terms of this agreement, Porter financed the renewal of his existing automobile liability insurance policy with Defendant Nationwide. Nationwide, having been duly paid in full, issued its renewal policy of automobile insurance to Porter, effective as of August 11, 1961, and expiring at 12:01 a.m. Standard Time, August 16, 1962 (Exh. A, R. 292-293).

On November 28, 1961, Porter, Nationwide's insured*, drove his motor vehicle into the rear of another vehicle on the Major Deegan Expressway in the Bronx. As a result of Porter's negligence, John Rotsettis and his wife Theoni were killed (leaving a six-month old orphan surviving) and a passenger, named Panteloglu, was very seriously injured.

Leon J. Greenspan, an attorney representing the two estates, made a claim on their behalf against Porter, who forwarded the same to his insurer, defendant Nationwide. From at least December of 1961 (Exh. 2, R. 273) through July, 1962, Nationwide negotiated with attorney Greenspan concerning this claim.

During the course of these negotiations, Mr. Greenspan advised Nationwide that in view of the limited policy of $20,000, he was prepared to settle *all* claims (two deaths and the serious injury) for the policy limits of $20,000. During this time, *when the policy was conceded to be in force and effect,* Nationwide failed to accept this offer or to make an offer of settlement in any amount. Nationwide did nothing whatever to conclude settlement of the matter despite the enormity of the claim against its insured, Porter, and despite the fact that it knew from Mr. Greenspan's offer that it could have promptly settled within the minimal policy limits.

In July of 1962, a lawsuit was instituted on behalf of the Rotsettis estates against Louis Porter. Porter forwarded the process served upon him to Nationwide which promptly defaulted (Exh. 3, R. 274).

On September 4, 1962, Mr. Greenspan wrote to Nationwide, calling the default to its attention and request-

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* This fact has been conclusively determined as a matter of law. *Rotsettis* v. *Nationwide Mutual Insurance Co.*, 58 Misc. 2d 667 (1967), unanimously affirmed 31 A. D. 2d 722 (1968), leave to appeal denied 23 N. Y. 2d 646 (1969).

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ing that it either settle the claim or interpose an answer on behalf of its insured (Exh. 3, R. 274). It was only in response to Mr. Greenspan's letter that Nationwide's attorneys and house counsel, DiBlasi, Marasco & Simone (subsequently known and referred to herein as "DiBlasi & Simone"), served an answer, demand for bill of particulars and notice of examination before trial. Thereafter, in October of 1962, Mr. Greenspan wrote Nationwide asking that Nationwide respond to his request for settlement of both death actions for the policy limits of $20,000 (Exh. 4, R. 275). During this continuing period, while the policy was conceded to be in full force and effect, and while the offer to settle for policy limits was concededly still outstanding, Nationwide made no offer to settle nor did it introduce any evidence at trial indicating that it had instituted an investigation into the facts surrounding the accident to determine the liability of its insured (Exh. 4, R. 275; Exh. D, R. 296, 312).

In November of 1962, Nationwide, *for the first time*, asserted that Porter's insurance policy had been cancelled *by the finance company* prior to the fatal rear-end collision (Exhs. 5 & 6, R. 276-79). This disclaimer by Nationwide was made eleven months after it had notice of the purported cancellation of the policy by the finance company; eleven months after it had notice of the accident and claim; four months after suit had been commenced, and notwithstanding the fact that it had received full payment in advance of all premiums due on Porter's insurance policy and with full knowledge that it had never cancelled itself!

In November of 1962, when Nationwide disclaimed, Porter was represented by the law firm of DiBlasi & Simone, who were employees of, house counsel to, and attorneys of record for the defendant Nationwide (R. 208). By reason of Nationwide's decision to abandon Porter and to claim that his insurance policy had been can-

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celled, a conflict of interest arose between the insurer and its insured. DiBlasi & Simone were thereby forced to choose between their duty to their client Porter (for whom they were attorney of record in the pending Supreme Court action in Westchester County) and their loyalty to their employer Nationwide, for whom they were house counsel and attorneys of record in numerous other proceedings (R. 207). DiBlasi & Simone, chose, *without examining the necessary documents,** to obey the instructions they received from Nationwide's underwriting department to abandon Porter (Exh. 6, R. 50, 202, 211-13) and thereupon took steps to withdraw from Porter's defense (Exhs. 5 & 6, R. 276, 278, 61, 202, 211-12). On November 19, 1962, DiBlasi & Simone wrote to Mr. Porter falsely advising him that *as a matter of fact,* his policy with Nationwide had been validly cancelled prior to the accident on November 28, 1961 (Exh. 6, R. 278). The letter advising Porter of the validity of the cancellation of his insurance policy was sent by Nationwide's attorneys at the instruction of the underwriting department of their employer, and without their having seen the premium finance agreement which purportedly granted the finance company a power of attorney upon which the validity of said finance company's purported cancellation depended (R. 214, 219). In their letter to Porter, Nationwide's attorneys suggested that he get his own attorney *to facilitate their withdrawal as his attorneys of record,* and further advised him that if he did not do so within ten days, they would obtain a court order granting them permission to withdraw as his counsel. Neither the letter from Nationwide's counsel misadvising Porter of the "valid" cancellation of his policy and

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* They failed to examine not only the finance company's documents (premium finance agreement and affidavit of service of alleged notice of cancellation) but even defendant's own Financed Policy Endorsement which specifically said that only defendant could cancel.

their intention to withdraw as his counsel, nor the letter from the company, also misadvising Porter of the foregoing, in any way advised Porter as to the consequences of said action upon him (Exhs. 5 & 6, R. 276, 279), nor did they suggest that he retain an attorney *to defend* the action against him.

Subsequent events disclosed that (notwithstanding the fact that a review of the premium finance agreement was absolutely necessary in order to make a good faith determination of the purported cancellation) neither Nationwide nor its attorneys, DiBlasi & Simone, had ever seen the premium financing agreement prior to their determination to abandon Mr. Porter (R. 61, 219, 214). The necessity of reviewing the finance agreement was of particular significance in the instant case since the purported Notice of Cancellation was sent by the finance company and not by the insurer, who concededly *never* sent a notice of cancellation (cf. § 576, Banking Law). Moreover, had Nationwide or its house counsel examined the finance agreement or the Defendant's own premium finance endorsement, it would have been apparent to them that the purported cancellation was not authorized (Exh. A, R. 292). Moreover, it was legally defective in that it additionally failed to comply with the appropriate sections of the Banking Law relating to time requirements for a properly authorized notice of cancellation.

Shortly thereafter, DiBlasi & Simone moved for leave to withdraw as counsel for Porter in the Supreme Court action, and plaintiffs cross-moved for leave to take an inquest against Porter. The alleged notice of cancellation was received by Mr. Greenspan with a copy of defendant's motion papers. Mr. Greenspan promptly advised Nationwide that the purported notice of cancellation was absolutely ineffective in that it was sent by a party other than the insurance company (a premium finance company) which had no legal right to send such a notice; and, in any event, the purported notice gave insufficient time, as a

matter of law, under the N. Y. Banking Law* and under the policy,** to effectuate a cancellation (R. 59, 61, 67, 69, 77).

Notwithstanding the fact that it was now on notice that the cancellation by the finance company was a legal nullity, Nationwide arbitrarily persisted in its determination to have its attorneys withdraw and allow an inquest to be taken against its insured, regardless of the all too foreseeable consequences. The court directed that all motion papers for both sides be personally served on Porter. In its unseemly haste to withdraw from the defense, Nationwide agreed to serve not only its motion but also the claimant's motion to take an inquest, on Porter personally, despite the fact that it was patently against Porter's interest (R. 101, 62-63, Exh. 7, R. 280). Thereafter, *by the same order* of the court that permitted Nationwide's attorneys to withdraw as Porter's counsel, the plaintiffs were given leave to take an inquest against Porter, *whom Nationwide knew to be undefended* and without legal representation.

Rather than proceed precipitously to take the court authorized inquest against the undefended insured, Mr. Greenspan wrote Nationwide and reminded the company of the opinion in the *Cannon* case, which squarely held that the purported cancellation was defective because it had given insufficient time under the applicable statute, and again offered settlement for the policy limits. He also *specifically warned Nationwide that if it was necessary to take an inquest and sue the insurance company, as a fiduciary he would seek enforcement of the entire judgment* (Exh. 8, R. 282). Mr. Greenspan noted in the same letter that *"the liability of an insurer for failure to deal in*

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* *Cannon* v. *Merchants Mutual Ins. Co.*, 35 Misc. 2d 625 (1962) (R. 220).

** *Stone* v. *Travelers Insurance Co.*, 40 Misc. 2d 164, 170-71 (1962).

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good faith upon proper notice of liability is black letter law."

Thereafter, despite Nationwide's insistence on leaving its insured defenseless, Mr. Greenspan continued his attempt to negotiate with Nationwide concerning settlement for the policy limits (Exh. 9, R. 283; Exh. 10, R. 285; Exh. 11, R. 286). When Nationwide still refused to settle or resume Porter's defense, although fully aware of the enormous liability to which Porter was now exposed (R. 193-95) and that he was undefended (no attorney having appeared for him), Mr. Greenspan forwarded to the company a notice of inquest (Exh. 12, R. 287). Nationwide, having consulted no independent counsel (cf. R. 188) and possessing no authority contrary to that cited by Mr. Greenspan (R. 209) (showing the cancellation notice invalid), chose, nevertheless, *without having seen the supporting documents* to rely upon the purported notice of cancellation sent by the premium finance company and refused Mr. Greenspan's offer to resume the defense of the action or to settle for the policy limits.*

The inquest before Mr. Justice Hugh S. Coyle resulted in a judgment against Porter of approximately $180,000 on behalf of the two estates. The judgment was personally served upon Nationwide and upon the insured pursuant to statute. Thereafter, upon the expiration of the statutory 30-day period and payment not having been received, Gerald Gordon was appointed receiver of the rights and assets of the insured, with specific permission

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* Despite the willingless of the claimants to abide and be bound by the event, Nationwide also refused to bring a declaratory judgment action to resolve the validity of the purported cancellation (R. 77-79). Cf. *U. S. Fid. & Guar. Co.* v. *Nationwide Mut. Ins. Co.*, 34 Misc. 2d 486 (2-21-62). Presumably, it did so with full awareness of the New York Law relating to waiver and estoppel. See, e.g., *Allstate Ins. Co.* v. *Altman*, 21 Misc. 2d 162 (1959). See also *Allstate Ins. Co.* v. *Gross*, 27 N. Y. 2d 263 (1970) (applying 1958 Amendment to § 167 of the Insurance Law).

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to employ counsel and sue Nationwide (R. 85). The instant action was thereafter commenced.

The first cause of action, on behalf of the personal representatives, was brought pursuant to Section 167 of the Insurance Law.* The third and fourth causes of action were brought in tort and contract based on Nationwide's bad faith, willful and wanton conduct of Porter's defense and refusal to defend or to settle within policy limits.

Plaintiffs moved for summary judgment before Mr. Justice Nolan at Special Term. Judge Nolan's unpublished intermediate opinion afforded Nationwide opportunity *to locate* and submit the premium finance agreement before the court granted summary judgment to plaintiffs. Judge Nolan stated:

> "If the finance agreement contains the authority to cancel the insurance contract, which defendant claims that it contains, a copy of the agreement will demonstrate that fact."

It was only after Judge Nolan's opinion that the president *of the finance company* produced the original finance agreement (R. 87-89).** Examination of this document

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* The second cause of action was later dismissed with consent of the plaintiffs by Mr. Justice Dillon as it related only to the loss of a claim against MVAIC. The judgment entered on the first cause of action conclusively determined that Porter was insured at the time of the accident rendering the MVAIC claim moot.

** These circumstances provide abundant evidence of the bad faith of the defendant. If Nationwide did not have the document purportedly containing the power of attorney in its possession, it could not have determined the validity of the cancellation intelligently or in good faith. Indeed, its failure to investigate and obtain this document without which it could not make a knowledgeable decsion is convincing evidence of bad faith. Alternatively, if it did have the document in its possession and failed to produce it for the court, it was in fact disclosing its awareness that the document was defective while purporting to rely upon it nevertheless.

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by Mr. Justice Nolan revealed that it contained no power of attorney which permitted the finance company to cancel the insurance policy. Summary judgment was granted to the extent of the policy limits on the first cause of action.* The Appellate Division, Second Department, unanimously affirmed Judge Nolan's determination 31 A.D. 2d 722 (1968), leave to appeal denied, 23 N.Y. 2d 646 (1969).

It thus became the law of the case, and conclusively determined herein, as provided in Mr. Justice Nolan's order, that due notice of cancellation of the policy was not given both "under the provisions of the finance agreement and pursuant to Section 576 of the Banking Law." Therefore, the policy of insurance was never cancelled and Nationwide was always under a duty to defend Porter.

During the course of the trial, attorney Greenspan related his numerous attempts to settle with Nationwide for the policy limits of $20,000. He testified that he personally furnished the insurance company with all necessary facts and legal authority to demonstrate that their abandonment of Porter was unjustified (R. 36-110) and that the original withdrawal by the insurer's attorney was directed by Nationwide's underwriting department and was not the result of an independent determination by

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* The finance agreement (Exh. 16, R. 290) had been defectively assigned to the finance company, since it purported to be assigned by "Jack Durg," whereas the payee (who would have power of assignment) was J. Donbarra. In addition, instead of the thirteen (13) days which Nationwide conceded were required by the Banking Law (Section 576), the purported cancellation gave but twelve (12) days and one minute. Further, the policy itself provided that cancellation *for any reason other than nonpayment of premium* required twenty (20) days' notice to the insured. Since the finance company had paid the entire premium in advance, cancellation had to be on twenty (20) days' notice when requested by the finance company. *Stone* v. *Travelers Ins. Co.*, 40 Misc. 2d 164, 170-71 (1962). There is no evidence to indicate that Porter failed to make the finance payment to J. Donbarra.

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the law firm of DiBlasi & Simone (Exh. 6, R. 278, 50, 202 and 211-12).

Mr. Greenspan established that he had repeatedly advised the insurance company of the defective cancellation (R. 59, 67, 69); warned it of its liability for bad faith (R. 69); continued his offer to settle in the amount of the policy limits on behalf of all claimants (R. 72-73); and repeated his willingness to delay taking an inquest to give Nationwide a further opportunity to defend or settle (R. 67). When he suggested that Nationwide might bring a declaratory judgment action—during which he would forbear taking any further steps against the insured, he was abruptly dismissed with the observation, "When did you get out of law school?" (R. 78).* Mr. Greenspan testified that no offer of settlement had ever been received from Nationwide; neither during the year when they appeared and defended the claim and the lawsuit on behalf of Porter, nor at any time subsequent thereto, despite the fact that the policy limit settlement offer remained open at least up to the time that Nationwide served its answer herein (R. 86-87).

Nationwide purportedly relied on a review of its records in determining that the cancellation of Porter's policy had been validly effectuated (App. Br., p. 2; Exh. 5, R. 51). In fact, no one making the decision concerning the validity of the alleged cancellation of Porter's policy ever looked at the underlying document (the premium finance agreement) which supposedly contained the power of attorney authorizing Premier to cancel (Exh. 16, R.

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* The attitude of Nationwide toward this entire matter was clearly reflected in their treatment of Mr. Greenspan, who "went to extraordinary lengths to demonstrate to the insurance company how baseless and unjustified their actions were * * *" (R. 311). As the Appellate Division noted, Mr. Greenspan "* * * was treated in a most cavalier and arrogant fashion and met with *refusal and neglect to properly and fairly examine into the matter* * * *" (R. 311-312). (Italics added.)

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290). DiBlasi, Nationwide's house counsel, conceded that he could not remember seeking the premium finance agreement at the time that he determined retroactively that the cancellation was valid (R. 219). Neither Nationwide, as Porter's insurer, nor DiBlasi, as attorney of record for Porter and house counsel for Nationwide, ever examined the premium finance endorsement attached to the policy (Exh. A, R. 292) which, as DiBlasi himself testified, established that the finance company could not cancel the policy but could merely request cancellation by Nationwide (R. 200). The premium finance endorsement was in the possession of Nationwide at all times and, in fact, was meticulously drafted by it. By any standard, good faith required that Nationwide, before it abandoned Porter, its insured under a fully paid insurance policy, thereby exposing him to substantial liability, at least examine the underlying documents *in its possession* to determine for itself the propriety of its actions. The failure of Nationwide to make the slightest effort to gather the relevant facts and examine the necessary documents in its possession, or in the possession of the finance company, is a classic example of willful neglect, evidencing a total disregard for the consequences of its acts, and, hence, bad faith *per se*.

On cross-examination (R. 103), Mr. Greenspan was asked whether the company's contention that the policy had been cancelled was, in his belief, false and hypocritical. He replied, "Absolutely." Asked in what way, he testified that defendant never made any investigation when he called to its attention that (a) the cancellation was defective; (b) that the notice had been sent by the wrong party; and (c) that even if sent by the right party, it did not given enough time under the statute. Nationwide was also false, he added, because it had knowledge of the *Cannon* case with no authority to the contrary, but refused to accept it even to the extent of raising an issue to be resolved in good faith by an

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opinion of independent counsel or a declaratory judgment action (R. 103-04). Moreover, although defendant's house counsel, representing Porter, knew of the *Cannon* case before withdrawing from the defense (R. 220), they never saw fit to tell the insured of its existence. Indeed, they failed to reveal to him that they had *never* seen the premium finance agreement (which the company did not have), nor considered the premium finance endorsement, in the company's possession, before rendering their opinion *adverse to their client the insured.* Obedient to Nationwide's instructions, DiBlasi & Simone, attorneys for both Nationwide and its insured, chose to embark on a program of willful neglect, satisfied to bury their heads ostrich-like in a disclaimer based upon a document which they had never seen.

Unmoved from their totally unjustified course of conduct, and determined to abandon Porter regardless of the propriety of their action, and with total disregard for the consequences of their actions upon the insured, Nationwide exposed Porter to yet another judgment. Attorney Samuel Feldman, who has practiced law in New York for approximately thirty-five years (R. 111), represented the injured passenger, Panteloglu. He testified that Nationwide returned to him a summons and complaint on behalf of the passenger and permitted him to take another inquest against Porter resulting in a further judgment of $35,000 (R. 112-13).* He testified that in his practice of thirty-five years, he had never before had occasion to take an inquest against anyone who was insured (R. 115). He also explained the usefulness of declaratory judgment as a device for resolving questions of cancellation as between the carrier and the insured. He testified that Nationwide never sought declaratory judgment nor would it defend on behalf of Porter (R. 116).

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* See Exhibit C, R. 295. Apparently, Porter still thought he was insured by the defendant in 1964 and turned the papers served on him over to defendant.

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Despite the fact that a New York County Supreme Court judgment was rendered against defendant, in the passenger's favor, in 1967,* Nationwide inexplicably still had not paid the passenger the balance of one-third of its original $20,000 policy as of the time of trial, which was over eight years after the accident (R. 117).

On cross examination, when asked if, in his opinion, Nationwide was obliged to bring a declaratory judgment action, Mr. Feldman replied, "Of course not. It's not obligatory; *they could take the risk that they took here*" (R. 119).

Donald Gavin testified that he had fifteen years' experience in the insurance industry with Travelers Insurance Company and Hartford Insurance Group, rising to claim manager of Hartford's Westchester Office in White Plains (R. 125-27). Familiar with the practices of the various insurance companies in Westchester (R. 128), *he stated that it was the policy in the industry to continue the defense until the rights of the respective parties to the policy were determined* (R. 131). He explained the use of declaratory judgment and described the use of independent counsel to resolve such questions as an "invariable practice in the industry" (R. 133).

On cross examination, in response to Mr. Halpern's statement he agreed that it is customary for the claims man in every case to accept the legal opinion of the attorney as to the law (R. 137) (*compare, however, Exhibit 6* [R. 278] *indicating that in this case, the law firm was instructed by the claims department*).

On re-direct, he specified that a question of cancellation should properly be resolved by declaratory judgment (R. 137) and that in this case there was

> "an issue as to whether the policy was in fact cancelled or not cancelled. The Company had issued a

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* *Panteloglu* v. *Nationwide Mutual Ins. Co., N.Y.L.J.*, May 10, 1967.

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> disclaimer which many companies do every day. Now, there is an issue as to whether the disclaimer was proper. In the meantime, there is an action pending. From my knowledge in the industry, the company would come in and defend this action and then determine the rights of the parties to the contract by way of the declaratory judgment action."

He further testified that where two deaths and a serious injury were involved *any* insurance claims manager would be aware that the exposure of the insured was far greater than the limits of the $20,000 policy (R. 140-41). He concluded that given the two deaths and a serious injury, plus an indication of liability *"the duty would be on the company to try to settle all the claims within the limits of the policy,"* and added, *"We have done it many times"* (R. 143).

Mr. Halpern, on re-cross attempted to limit Mr. Gavin's answer to cases where the policy was concededly in force. However, at R. 145 that matter was cleared up completely.

> "Q. Mr. Gavin, if in fact there is a question of coverage, a question at any point, does your company or any company in the industry that you know of abandon the defense of the insured? A. No."

John J. Gochman testified that he has been a member of the bar for ten years; associated for seven years with Allstate Insurance Company in White Plains where he rose to the position of supervisor and was responsible for the training of claims adjusters and claims supervisors (R. 149-50). He explained the procedure for checking documents to ascertain that a cancellation had been validly made (R. 151). *He stated that the invariable practice of companies in this area was to defend the insured until the cancellation question was resolved* (R. 153, 166-167).

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Mr. Gochman testified that the practice of insurers in the community, as a general rule, was to settle excess cases within policy limits where possible (R. 156). He specifically stated that where the company has denied coverage by reason of a claimed cancellation and legal authority is submitted which shows at least a question as to the propriety of the cancellation, the practice of insurers generally in this area was to send the file to outside counsel who would move for declaratory judgment (R. 157-174).

Arthur Carroll, a recently hired employee of Nationwide, testified for the defense that he was an attorney admitted to practice in 1955 and previously employed for ten years by Allstate (R. 179) (his purpose apparently was to question the use of a reservation of rights letter in the fact pattern of this case). On cross examination, it developed that (in his fifteen minute pre-trial briefing) he had not been told that no cancellation notice had ever been sent by Nationwide or that the purported cancellation notice had been sent by someone with no authority to send it (R. 182-83).

Mr. Carroll testified as to his procedure for investigating a claimed cancellation (R. 183-84). He admitted that the time factor would have to be checked to determine the validity of the notice of cancellation (R. 185). He emphasized that *a cancellation sent by a party other than the insurance company would require proof of authority of the third party to act before accepting such a notice as valid* (R. 185). He recognized that a determination of policy cancellation is always adverse to the interests of the insured and, therefore, that *it is the practice in the insurance industry for the company to have sufficient evidence of the cancellation before it disclaims* (R. 186). He conceded that if a case was cited by the claimant's attorney and the company's legal department could come up with no authority to the contrary, it would raise a sufficient question as to whether the policy had been validly

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cancelled. He conceded also that it would "definitely" raise a duty upon the insurer to the insured to have that question resolved (R. 187): Where the question is not free from doubt, he would *at least* obtain the opinion of independent counsel (R. 188). The last question asked on cross examination of Mr. Carroll and his answer is conclusive proof of defendant's bad faith:

> "If we assume that the company has claimed that the policy is cancelled, if we assume that there is a limited policy, if we assume that the claim involves two deaths and a serious injury, and if we further assume that the claimant's attorney has submitted authority to support the proposition that the policy has not been validily cancelled, in that situation, sir, do you know of any company in the industry, that would completely abandon the insured's defense? A. No" (R. 196).

Vincent DiBlasi, a member of the firm of DiBlasi & Simone, an attorney with twenty years experience representing insurance companies, testified on behalf of the defendant. Conceding that he was in fact an employee as well as house counsel and attorney of record for the company (R. 200, 208) Mr. DiBlasi commenced his direct testimony by admitting that the Defendant's Exhibit A, the financed premium policy endorsement, "requires the company, in accordance with its terms, to make cancellation" (R. 200), as opposed to Nationwide's contention, supposedly based on DiBlasi's opinion, that the finance company itself could unilaterally cancel. This statement, coupled with DiBlasi's admission that he was "informed," the policy was cancelled and that he withdrew pursuant to direction of Nationwide's underwriting department, conclusively established that the defense of good faith reliance on DiBlasi's retroactive opinion (that cancellation was valid) was a belated afterthought contrived *nunc pro*

tunc to avoid the legal responsibility for irresponsible acts.*

He testified that he withdrew as attorney for Porter *because* "he had been informed" by Nationwide that the policy had been cancelled (R. 213) (see also, Exh. 6, R. 278). Mr. DiBlasi admitted that prior to the time he decided to withdraw as Porter's counsel he could not recall seeing the documents upon which the cancellation was based (R. 214) and further that Mr. Greenspan had timely advised him of the decision in the *Cannon* case (R. 203) even before he made his motion to withdraw (R. 220). He refused to accept *Cannon* as authority even to the extent of advising his client, Porter, of its existence or significance (R. 278-79).

Initially, Mr. DiBlasi was asked upon cross examination:

> "Q. At the time, Mr. DiBlasi, that you made this decision in good faith, whom were you representing? A. When I first looked at the file? I don't understand your question.
>
> "Q. When you made the determination that the policy had been validly cancelled, what client were you representing in this Court? A. I'm afraid I don't understand what you mean.
>
> "Q. I'll explain it to you in black and white. Weren't you the guy whose firm was representing Louis Porter with filed pleadings in a lawsuit in this Court? A. That's correct" (R. 205).

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* The decided cases have invariably rejected this defense. *Landie* v. *Century Indemnity Company*, 390 S.W. 2d 558, 563 (Mo. 1965); *Western Casualty and Surety Company* v. *Herman*, 405 F. 2d 121, 1234 (8th Cir. 1968); *Foundation Reserve Insurance Company* v. *Kelly*, 388 F. 2d 528 (10th Cir. 1968); *Comunale* v. *Traders and General Insurance Company*, 328 P. 2d 1968; 202 (Cal. 1958).

Apparently, the suggestion of a conflict of interest upset Mr. DiBlasi severely, for his initial response was a monumental freudian slip ("I determined and was satisfied in my own mind that his policy had NOT been cancelled"), which the court generously corrected for him (R. 206).

After refreshing his recollection of the *Cannon* case by reviewing the opinion itself, Mr. DiBlasi conceded that the time factors in that case were substantially identical with the time factors in this case and also that he could find no case that disagreed with *Cannon* (R. 209). He confirmed that the initial determination and advice that the policy had been cancelled came from the underwriting department (R. 211-12) and that the underwriting department at Nationwide made the determination that the finance company had the authority to cancel (R. 213). As employee of, house counsel to, and attorney of record for Nationwide (R. 208), Mr. DiBlasi was simply following the orders given by the defendant to withdraw from Porter's defense (Exh. 6, R. 278). He could not even recall seeing a copy of the premium financing agreement which determined the rights of the parties (R. 214, 219). Apparently he never considered the premium finance endorsement. He further admitted that he had never advised Porter of his right to question Nationwide's determination regarding the *Cannon* case (R. 228). There was no evidence that he ever advised Porter of either the existence of *Cannon*, of which he was aware when he made his motion to withdraw as Porter's attorney (R. 220), or of claimant's offer to settle within policy limits. Nor was the customary excess letter sent.

When asked what he did to protect his client of record, the insured, Mr. DiBlasi stated that he told him to get a lawyer (apparently, however, only for the purpose of facilitating Nationwide's withdrawal; Exh. 6, R. 278). He added piously, "I certainly would never abandon an insured" (R. 235) (cf. R. 196).

In this case, the proof at the trial conclusively established the following facts:

1. The insurance policy at all times relevant remained in force and was never validly cancelled (31 A. D. 2d 722);

2. Pursuant thereto, Nationwide Insurance Company was at all times under the duty to defend (Exh. A, R. 292, Policy Para. II);

3. Nationwide represented Porter for approximately seven months in claim and four months in suit without claiming that the policy was cancelled (Exhs. 2, 3, 4, R. 273-75, 42-47);

4. During the year in which Nationwide appeared for Porter prior to its claim of cancellation, it made no offer to settle any or all of the claims against Porter (R. 86, 87);

5. At all times, Nationwide was offered and aware of the opportunity to settle all of the claims against Porter for the policy limits (R. 69, 72-73, 87; Exh. 4, R. 275; Exhs. 8 & 9, R. 282-83; 58 Misc. 2d at 670);

6. In connection with the defense of the action, Nationwide provided not independent counsel but house counsel (R. 205-08) who could not help but be compromised if any question arose as to coverage or cancellation as between the insurer or the insured (R. 99-101). See *New York Consolidated R.R. Co.* v. *Massachusetts Bonding & Ins. Co.*, 193 App. Div. 438 (2nd Dept. 1920), aff'd 233 N. Y. 547 (1922); *American Employees Ins. Co.* v. *Boble Aircraft Spec.*, 205 Misc. 1066, 1074-76 (1954); *Trieber* v. *Hopson*, 27 A. D. 2d 151 (3rd Dept. 1967); *Schwartz* v. *Sar Corp.*, 19 Misc. 2d 660, 666-68 (1959), rev'd on other grounds 9 A. D. 2d 910 (2nd Dept. 1959); *Kaudern* v.

Allstate Insurance Company, 277 F. Supp. 83, 91 (D. N. J. 1967); *Crum* v. *Anchor Casualty Company*, 119 N. W. 2d 703, 712 (Minn. 1963);

7. Attorney Greenspan promptly and fairly informed the company of the weaknesses of its position with respect to the alleged cancellation and furnished the insurer with citation to the applicable uncontroverted law (58 M. 2d at 670; R. 220);

8. Nationwide was aware of no contrary authority and made no fair response to the citation furnished by Mr. Greenspan which indicated that Porter was insured by defendant (R. 209. 104). See *Foundation Reserve Insurance Company* v. *Kelly*, 388 F. 2d 528 (10th Cir. 1968) (applying Okla. law). It chose to abandon its insured completely rather than resolve the cancellation question in an inexpensive and efficient manner through declaratory judgment which would have permitted it to give consideration and protection to the interests of the insured; cf. *U. S. Fid. & Guar. Co.* v. *Nationwide Ins. Co.*, 34 M. 2d 486 (1962); nor did it obtain the opinion of independent counsel (R. 188);

9. Defendant insurer declined every opportunity to settle the claims against Porter and willfully refused to settle or continue the defense of the insured (R. 86-87; 58 M. 2d at 670);

10. In refusing to bring a declaratory judgment action, Nationwide was undoubtedly aware of the New York precedents (relative to estoppel and waiver) forbidding an insurer to withdraw from the defense of its insured where it has represented him in claim and in suit without reservation for almost a year. See, e.g., *Allstate Ins. Co.* v. *Altman*, 21 M. 2d 162 (1959);

11. Contrary to the interest of the insured, Nationwide procured and effected personal service of plain-

tiff's motion for an inquest upon the insured (R. 62-66, 101). This was clearly adverse to Porter's interests as it conferred the right on the injured parties to take the inquest against him. Defendant did this gratuitously, knowing it was adverse to plaintiff's interests, in the hope of securing a benefit for itself (R. 101, 62-64). This was not denied by Mr. DiBlasi, who later testified at the trial;

12. As of its withdrawal, Nationwide apparently had made no attempt to establish Porter's defense although he specifically claimed that he had a witness thereto (Exh. D, R. 296). Nationwide neither introduced nor attempted to introduce any evidence that it had made any investigation whatever beyond taking the statement of its insured;

13. Nationwide did not have the original premium finance agreement when its underwriting department made the determination of cancellation in the first place (R. 88-89);

14. When the validity of its cancellation was called in question by plaintiff's attorneys' citation to the *Cannon* case, defendant never made any attempt to obtain the original premium finance agreement from the finance company (R. 103-04; 214, 219). See *America Fidelity Fire Insurance Company* v. *Johnson,* 177 So. 2d 679, 683 (Fla. 1965); *Radcliffe* v. *Franklin National Insurance Company,* 298 P. 2d 1002, 1024 (Ore. 1956); *Milbank Mutual Insurance Company* v. *Schmidt,* 304 F. 2d 644 (8th Cir. 1962);

15. Pursuant to permission contained in Judge Nolan's intermediate opinion on the motion for summary judgment, defendant finally located the original premium finance agreement (see record on appeal, *Rotsettis* v. *Nationwide Mutual Insurance Company,* 31 A. D. 2d 722

[1968], pp. 68, 69, 80-84) (R. 88-89). When the agreement was located, it was apparent that it was defective in that it contained no power of attorney; gave insufficient time under the policy and the banking law; and that, because of a defective assignment, it conveyed *no rights at all* to the premium finance company (58 M. 2d 667);

16. Notwithstanding the belated discovery of this document, the company made no attempt to settle at that time, nor after Mr. Justice Nolan's determination (R. 86), although it still had the opportunity to settle as the offer to settle all claims for policy limits had never been withdrawn (R. 87);

17. Nationwide, at all times, had in its possession the financed premium endorsement which conclusively showed that only Nationwide could cancel (Exh. A, R. 292);

18. All of the foregoing was done with full knowledge that defendant Nationwide itself had never sent any cancellation or purported cancellation of this policy (R. 102-03);

19. At no time, during the pendency of the summary judgment motion or after the decision, did the attorneys retained by Nationwide to represent Porter make any disclosure of his rights to Porter either as a result of the finding of the premium finance agreement or of Judge Nolan's ruling thereon granting summary judgment. They made no offer or attempt to resume the defense, although that course was open to them, and they made no attempt to settle within the policy limits, although that course was open to them. Either course would have protected the interests of the insured. The detrimental effect on the insured from the conflict of interest of "his" counsel is apparent from these facts. *New York Consolidated R. R. Co.* v. *Mass. B. & Ins. Co.*, 193 App. Div. 438 (2nd Dept.

1920), aff'd 233 N. Y. 547 (1922); *American Employers Ins. Co.* v. *Goble Aircraft Spec.*, 205 Misc. 1066, 1074-76 (1954); *Trieber* v. *Hopson*, 27 A. D. 2d 151 (3rd Dept. 1967); *Schwartz* v. *Sar Corp.*, 19 Misc. 2d 660, 666-68 (1959), rev'd on other grounds 9 A. D. 2d 910 (2nd Dept. 1959);

20. In spite of the conflict of interest, Nationwide never attempted to obtain the opinion of independent counsel regarding either the validity of the claimed cancellation and the effect of the premium finance agreement, or the propriety of a declaratory judgment action or a defense under a reservation of rights (compare the testimony of Nationwide's employee-expert, Arthur Carroll, at R. 188);

21. Nationwide never sought an authoritative determination of the validity of the cancellation by declaratory judgment although the same was easily available (R. 79). This was so despite the fact that the injured parties were agreeable to awaiting the outcome of such an action (R. 77);

22. Nationwide purported to rely on company records (appellant's brief, p. 2) and on the advice of defendant's attorneys (appellant's brief, p. 27). However, its records (the premium finance endorsement) conclusively showed that there was no valid cancellation, and it never attempted to obtain the records which its own witnesses said were necessary to evaluate the claimed cancellation (R. 185). Its house counsel stated that he acted pursuant to the instruction of Nationwide rather than the other way around (R. 211; see, also, R. 202);

23. Nationwide was fully aware of the entry of the excess judgment and the amount thereof (Exh. 13, R. 287);

24. Nationwide never disclosed to Porter that the injured parties continued to negotiate after the alleged

cancellation and continued to offer (or had *ever* offered) to settle for a total of $20,000 both before *and after* the $180,000 judgment on inquest (Exhs. 8-11, R. 282-86);

25. Defendant not only failed to disclose to Porter the existence of the *Cannon* case and its favorable decision to him, but caused its house counsel (purportedly representing Porter) to affirmatively misinform him, while still representing him, that the policy was cancelled. This was done without examining the necessary documents and based on hearsay information from the adversely interested insurer (Exh. 6, R. 278; see, also, Exh. 5, R. 276). The insurer and its house counsel did not even tell him that he had a right to declaratory judgment or to otherwise contest Nationwide's determination of cancellation; or that his insurer, Nationwide, would be liable for his attorneys' fees and expenses in defending the negligence action if, in fact, the policy had not been validly cancelled;

Nationwide's house counsel, while representing Porter, accepted the fact of cancellation without question—taking a position adverse to the interests of their client, Porter—although they could not recall ever seeing the premium finance agreement (R. 219), and there is no evidence that the company ever saw it until after Judge Nolan's intermediate opinion herein. Nevertheless, the company misrepresented in its letter to Porter that its records established the fact of cancellation prior to the accident, when as a matter of fact this was untrue (Exh. 5, R. 276);

26. The defendant insurer never gave Porter any opportunity to settle for his own account by advising him of the continuing offer to settle within policy limits;

27. During all of the time subsequent to its withdrawal from Porter's defense (especially after notice of inquest), Nationwide was aware that Porter was undefended and ex-

posed to a potentially enormous excess judgment for causing two deaths and a serious injury (R. 189-90, 194, 140-41);

28. Mr. Greenspan fairly warned Nationwide of its excess liability for a bad faith refusal to settle or defend (Exh. 8, R. 282);

29. According to the testimony of its own employee expert, no company in the insurance industry would completely abandon the insured's defense under the circumstances of this case (R. 196); see, *Sukup* v. *State*, 19 N. Y. 2d 519, 522 (1969);

30. All of the actions undertaken by Nationwide were done in view of its assumed limit of $20,000 as the insurance company's maximum liability and an indeterminate liability, possibly as high as a quarter of a million dollars, on Porter's part;

31. Almost ten years after the fatal accident, four years after judgment against this defendant in favor of the injured passenger,* and three years after the Appellate Division and the Court of Appeals concluded the question of cancellation in favor of the insured, Nationwide, inexplicably, still had not paid the remaining one-third of its policy to the injured passenger, despite the finality of the judicial determination of its liability therefor (R. 117); and

32. Throughout the course of this litigation the attorney for the estates of the deceased persons went to extraordinary lengths to demonstrate to the insurance company how baseless and unjustified its actions were, but was treated in a most cavalier and arrogant fashion and met with a refusal and neglect to properly and fairly examine into the matter, thus, repeatedly ratifying its prior wrong-

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* *Panteloglu* v. *Nationwide Mutual Ins. Co.*, N.Y.L.J., May 10, 1967 (S. Ct., N. Y. Co.).

ful conduct (opinion of Appellate Division, Second Dept., R. 311).

From all of the foregoing, the jury was perfectly warranted in finding that Nationwide's refusal to investigate or obtain the necessary documentation, even after its claim of cancellation was drawn in question (R. 103-04), its refusal to seek declaratory judgment or obtain the opinion of independent counsel, and its refusal to accept uncontroverted New York authority as so much as raising a question on behalf of its insured as to the propriety of the cancellation abundantly evidenced its bad faith attempt to save its limited policy while abandoning its insured completely to whatever evils might befall him.

A verdict with special findings was brought in by the jury in answer to eight specific questions, phrased by the court without objection by either party (R. 20-21). In summary, the jury unanimously found:

(a) That Nationwide acted in bad faith, wantonly and recklessly;

(b) That Porter was entitled to recover compensatory damages on both the contract and tort causes of action;

(c) That Nationwide's bad faith, wantonness and recklessness were such as to warrant the imposition of punitive damages against it.

Based upon its findings of fact the jury awarded the plaintiff $201,129.17 in compensatory damages and $300,000 in punitive damages.

Upon motion after trial to set aside the verdict, the Trial Court struck the punitive damages and permitted the compensatory damages to stand (62 Misc. 2d 689) (R. 22). Thereafter, the Appellate Division affirmed the Trial Court (3-2), with the dissenters writing solely as to damages and taking no issue whatever with the unanimous jury finding of bad faith (37 A.D. 2d 265) (R. 307). Thereafter, the New York Court of Appeals reversed the judgment and dis-

missed the complaint, holding that there was no evidence of bad faith (30 N.Y. 2d 427 (1972)). The majority opinion did not reach the question of damages. The three judges who dissented held that the finding of bad faith was "virtually compelled by the record" (30 N.Y. 2d 446) but that on the issue of damages, that question should be resubmitted to a new jury by reason of the alleged financial condition of the insured.

It is Petitioner's contention herein, first, that the action of the New York Court of Appeals utterly denied Petitioner his right to trial by jury in that the New York Court of Appeals, which was bound by the two court rule as to the facts found by the jury and affirmed by the Appellate Division. *City of New York* v. *Third Avenue Railway Company*, 294 N.Y. 238, 243 (1945). Nevertheless, the Court of Appeals re-examined the facts found by the jury and determined them contrary to the jury finding. Thus, the jury determined that Nationwide did not rely on the advice of counsel and that it could not justifiably do so by reason of its failure to inform counsel of the facts surrounding Porter's alleged default in payment. Indeed, as hereinafter set forth, the evidence never showed any default in payment whatever, although the Court of Appeals majority treated that as a conceded fact. On the issue of insolvency, the Trial Judge, in his opinion on the post-trial motion, clearly stated (62 Misc. 2d 692)

> "The defendant herein failed to introduce any proof to overcome the presumption that Porter had been damaged by the mere entry of the judgments against him and to the extent thereof. Nor did the defendant attempt to show that Porter was insolvent at the time and thus sustained no damage (see *Young* v. *American Cas. Co. of Reading, Pa.*, 416 F. 2d 906 (2 Cir., 1969); *Brockstein* v. *Nationwide*, 417 F. 2d 703 (2d Cir. 1969)."

Notwithstanding this, the Court of Appeals resolved against plaintiff an issue never raised by the defendant at the trial

and as to which the only evidence in the record (introduced for a different purpose entirely) showed Porter to be an apartment resident who owned his own car, was gainfully employed, and had not a single unpaid debt. It is submitted that the determination of the New York Court of Appeals was so utterly arbitrary and capricious as to deprive Petitioner of his right to trial by jury and, as to the insolvency question, to deny him equal protection. Both of the foregoing constituted the taking of Petitioner's property—his collectible judgment for over a quarter of a million dollars —without due process of law.

The questions herein presented for review were created and caused by the actions of the New York Court of Appeals in its opinion and decision, and they are, therefore, raised immediately by the petition for rehearing and in this Court. The questions were raised also in Petitioner's main brief in the Court of Appeals in which we cited *Tennant* v. *Peoria & P.U. Railway Company,* 321 U.S. 29 (1944). Accordingly, the questions presented are properly preserved for review in this Court.

Reasons for Granting the Writ

A. Violation of Petitioner's Seventh Amendment Right to Trial by Jury.

In this case there was and can be no question that petitioner was entitled to trial by jury under state law. The trial was had before a jury of twelve who unanimously found for the petitioner, and specifically found that the evidence showed Nationwide's conduct to be wanton, reckless and in bad faith (R20). This finding was affirmed by the Appellate Division and the two justices who dissented in the Appellate Division found no fault with the jury's determination on this issue. It may therefore be fairly said that of the twelve Appellate Judges who passed on this issue (seven in the New York Court of Appeals, and five in

the Appellate Division, 2d Dept) two-thirds of them agreed with the jury's determination. Three judges of the Court of Appeals found the jury finding "virtually compelled by the record" 30 NY 2d 446. The majority in the Appellate Division found that "there was abundant evidence adduced at the trial from which the jury could and did find bad faith on the part of Nationwide." 37 AD 2d 270. The remaining two justices in the Appellate Division, as can be determined from their dissenting opinions, found no fault with the jury's determination on this issue. Thus, it is strange indeed that a minority of one-third of the Appellate Court judges should determine that there were no facts sufficient even to submit for the jury's determination. To reach this conclusion, the majority in the Court of Appeals was compelled to re-examine and refind as facts that which had been determined to the contrary by the jury on abundant evidence and to make findings of fact on issues which had never even been raised in the trial court by the defendant, as hereinafter set forth. By so doing the majority in the Court of Appeals arbitrarily and capriciously destroyed petitioner's right to trial by jury under the seventh amendment.

1. Porter's allegedly conceded default in payment:

Nowhere in the entire course of the litigation was Porter's alleged default in payment conceded or proved. In the Trial Court where nonpayment had not been explicitly pleaded by the defendant (Tr. 17), there was an utter failure of the defendant's attempt to prove actual nonpayment (Tr. 201) as distinguished from the fact that Nationwide *assumed,* as their counsel conceded on the record (Tr. 195), that the policy was cancelled. In addition to the fact that Nationwide had been fully paid in advance (Nationwide's Brief in the Appellate Division, Page 4; Tr. 200; Exhibit A, Tr. 292), there was absolutely no proof of any kind offered by way of records or witnesses from the finance company that any payment was

in default or had not been made. The burden of proving a valid cancellation lay squarely on Nationwide as a matter of settled N.Y. law. *DePersia* v. *Merchants Mutual Casualty Company*, 268 App. Div. 176 (2d Dept. 1944), aff'd., 294 N.Y. 708 (1945). Thus, it was not enough that Nationwide *assumed* there had been a valid cancellation on the basis of a purported notice of cancellation from someone whose authority to act and whose basis for acting were never inquired into by Nationwide or its counsel (Plaintiff's Main Brief in Court of Appeals, Page 8). Not only is this evident from defense counsel's statement at the trial (Tr. 195), but from the fact that actual nonpayment was never proved nor argued to the jury but only the fact that Nationwide assumed that there had been a nonpayment. It could hardly have been argued otherwise, since Nationwide admitted they never even saw the documents on which Premier's action was based until after Judge Nolan's intermediate opinion. Indeed, if Nationwide had ever believed that the policy had been validly cancelled for nonpayment of premium, why was there no proof of refund of the unearned portion of the premium to Premier as required by statute, by Nationwide's own premium finance endorsement and by the premium finance agreement upon which Nationwide relied? Why, if the policy was actually canceled, was there no proof of filing with the Motor Vehicle Department? *Orsini* v. *Nationwide Mutual Insurance Company*, 35 AD 2d 238 (3rd Dept. 1970).

The fact that there was no proof of actual nonpayment was not merely argued by the plaintiff to the jury and accepted by them, but, in addition, it was vigorously asserted in the Appellate Division* and in this Court. (Plain-

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* Page 1 of Plaintiff's Reply Brief in the Appellate Division pointed out that Nationwide's Brief as Respondent in the Appellate Division, "seeks for the first time, as an act of desperation, to create an issue about the payment of premiums"; we added, "in fact, there is no such issue in this case."

tiff's Main Brief in Court of Appeals, Page 79—No proof of nonpayment to Nationwide; Page 10—No proof of nonpayment to the owner of the premium finance agreement; Plaintiff's Reply Brief in Court of Appeals, Page 2, where we emphasized, "the complete absence of any attempt on Nationwide's part to make any factual or evidentiary showing regarding the alleged nonpayment to a finance company which did not own the finance agreement.")

It is thus apparent that the alleged nonpayment by Porter was never conceded at any stage of this litigation, nor was it ever proven. Indeed, at the trial, the carrier argued only that it *assumed* nonpayment. Since Nationwide had the burden of proving its defense and since it offered no proof whatever of nonpayment, the statement in this Court's opinion that Porter concededly defaulted in payment is simply not supported by the record. For that reason, this case comes under the general rule of *Johnson* v. *General Mutual Insurance Company*, 24 N.Y. 2d 42 (1969), since *there is no evidence that the insured was actually in default in his finance payment and the fact that the policy was wrongfully canceled is the law of this case.*

2. Nationwide's alleged reliance on advice of counsel, and its failure to consider or submit to counsel all of the facts concerning Porter's alleged default.

It is abundantly clear from the record in this case that Nationwide's attorneys were *instructed by the company* that the policy had been cancelled and to withdraw (R. 211, 278, 202). These instructions came from the underwriting department (R. 211, 212) and represented the company's actions and *instructions to its counsel and not any reliance on the advice of counsel.* The determination that the policy was cancelled and that Premier had authority to cancel was made by the underwriting department and not by the attorney according to the very attorney whose opinion was allegedly relied upon (R. 213).

This was completely understandable since the attorney didn't ever recall seeing the premium finance agreement (R. 214, 219). It is thus apparent, first, that no decision was made in reliance upon the attorneys' advice; and second, that there was no right to rely upon any advice given by an attorney who had not been acquainted with "the facts of Porter's default in payment" (compare, Court of Appeals Opinion, Page 6).

This set of circumstances is, of course, directly related to the fact that no inquiry was made by Nationwide or its counsel into (1) the alleged nonpayment or (2) into the purported authority of Premier or (3) into the fact that Nationwide's own financed premium endorsement provided that only Nationwide could cancel and that there was no cancellation ever made by Nationwide. When Attorney DiBlasi testified at this trial, he had no explanation whatever for his failure to see the premium finance agreement (which had no power of attorney) (58 Misc. 2d 670) other than the fact *that he didn't make* the decision, the underwriting department made it.

As Nationwide's counsel so accurately conceded, *"The evidence is definite that the company has assumed that the policy is canceled."* (R. 195, emphasis added).

In this state of the record, it was clear that Nationwide made no attempt to provide attorney DiBlasi with all of the information necessary to make a rational determination of the facts surrounding Porter's alleged nonpayment or the purported cancellation of his policy. All of the courts which have passed on this subject are unanimous in declaring that for a decision to be relied upon as made in good faith, it must be based on knowledge of the facts so far as they can reasonably be obtained after investigation with due diligence. *Young* v. *American Casualty Company*, 416 F. 2d 906, 910 (2d Cir. 1969); *Radcliffe* v. *Franklin National Insurance Company*, 298 P. 2d 1002, 1024 (Ore. 1956); *Milbank Mutual Ins. Co.* v.

Schmidt, 304 F. 2d 640, 644 (8th Cir. 1962); *American Fidelity Fire Ins. Co.* v. *Johnson*, 177 So. 2d 679, 683 (Fla. 1965). Indeed, the entire defense of reliance upon misinformed house counsel has been invariably rejected. *Landie* v. *Sentry Indemnity Company*, 390 S.W. 2d 558, 563 (Mo. 1965); *Western Casualty & Surety Company* v. *Herman*, 405 F. 2d 121, 123 (8th Cir. 1968); *Foundation Reserve Ins. Co.* v. *Kelly*, 338 F. 2d 528 (10th Cir. 1968); *Comunale* v. *Traders and General Ins. Co.*, 328 P. 2d 198, 202 (Cal. 1958). No contrary case has been cited by Nationwide.

In summary, Nationwide made the original determination to claim cancellation without any investigation into the facts surrounding Premier's purported notice, instructed its attorneys to withdraw and, despite knowledge of the claimed defects, never obtained the necessary documents or investigated to locate them until after Judge Nolan directed that they do so. Their expert witness conceded that this was contrary to every custom and practice in the industry. No explanation was ever offered by Nationwide for their failure to investigate.

In this state of the record, there was at least a question of fact as to whether Nationwide relied at all upon anything attorney DiBlasi said and this question was argued to the jury and answered by them in their specific finding that Nationwide acted in bad faith, wantonly and recklessly. Since that finding was affirmed by the Appellate Division, precedent in this Court indicates that this finding is not open to review at the Court of Appeals level. 11 Carmody Wait 2d, Section 71:111; *City of New York* v. *Third Avenue Railway Company*, 294 N.Y. 238, 243 (1945).

Certainly, it cannot be said that there was no evidence to support the finding that Nationwide did not rely upon DiBlasi's opinion where that finding was concurred in by a unanimous jury, affirmed by a majority of the Appel-

late Division, unquestioned by the dissent in the Appellate Division, and concurred in by three members of this Court who described the finding of bad faith as "virtually compelled by the record". (Court of Appeals Dissenting Opinion, Page 6). It is, therefore, respectfully submitted that the statement in this Court's opinion at Page 4, that Nationwide relied upon the opinion of its counsel or the finding that such reliance, if it existed, was justified, is unsupported and contrary to the record, the affirmed findings of fact in this case, and the applicable law.

3. The alleged insolvency of Louis Porter.

Porter's alleged insolvency was never pleaded by Nationwide as a defense. Moreover, no proof introduced at the trial supported that defense. As aptly stated by the Trial Justice,

> ". . . the defendant herein failed to introduce any proof to overcome the presumption that Porter had been damaged by the mere entry of the judgments against him and to the extent thereof. Nor did the defendant attempt to show that Porter was insolvent at the time and thus sustained no damage (see *Young* v. *American Cas. Co. of Reading, Pa.*, 416 F. 2d 906 [2 Cir., 1969]; *Brockstein* v. *Nationwide*, 417 F. 2d 703 [2d Cir., 1969])."

The decided cases which involved this point all involved insolvent adjudicated bankrupts (e.g. *Harris* v. *Standard Acc. Ins. Co.*, 297 F. 2d 627 (2d Cir.)) or insolvent estates (e.g. *Bourget* v. *Geico*, 456 F. 2d 282 (2d Cir. 1972)), and in no case was there a complete absence of proof in the record of insolvency of record at the time of entry of the excess judgment. Thus, in the recent *Bourget* case, the Court pointed out that the Connecticut Estate Law was such that priority claims exhausted the deceased insured's estate and that there were no assets of any kind which could be reached as a matter of public court record.

In *Young* v. *American Casualty*, 416 F. 2d 906 (2d Cir. 1969), by comparison, where the insured paid a portion of the judgment and then went into bankruptcy, the Court directed the insurer to pay the entire judgment reasoning that until the balance of the judgment was satisfied, the insured could not recover from the trustee in bankruptcy that which he was out of pocket. Id. at 911.

In this case, the only evidence of record that even remotely suggests any financial difficulty on Porter's part was the unsworn statement (Exhibit "D", Tr. 296) taken from Porter which disclosed: first, that he lived in a basement apartment at 122nd Street; second, that he owned an automobile; and third, that he was regularly employed. This statement was introduced not upon any question of solvency but to show that Porter claimed to have a defense and a witness as well, which Nationwide never investigated. Surely, it cannot be said as a matter of law, that a man who is regularly employed, owns a car, maintains his own apartment, and is not shown by the record to have any unpaid debts, is insolvent. The record in this case is thus completely distinguishable from any case cited in the concurring opinion of the Chief Justice.

If Louis Porter is presently employed, as the record showed him to be, he is subject to garnishee. If he presently owns a car, as the record showed he did, that car is subject to levy. Any other funds or assets coming into his hands are absolutely unprotected from the consequences of the existing judgments against him. The true "uncollectable judgment" in the *Bourget* and *Harris* cases is a judgment against an insolvent deceased or one discharged in bankruptcy who was insolvent prior to entry of judgment, who has no liability for the judgment. There was absolutely no showing in the record or even an attempt to show that these circumstances were true of Louis Porter. On the contrary, since Porter's life is presumed to continue, the only reasonable conclusion is that of his working to support himself, that his wages are subject

to the judgment, and that until the judgment has been satisfied, Louis Porter has, indeed, suffered real and actual damage under the doctrine set forth in *Henegan* v. *Merchants Mutual Insurance Company* and the multitude of cases in other jurisdictions upon which that decision relied.

What is said hereinabove is not to take issue with the general rule applicable in bona fide cases of insolvency of record. However, we respectfully take sharp issue with the finding implicit in the Chief Justice's opinion that Porter was de facto insolvent. No detrimental evidence of his credit standing was introduced at this trial, and in the absence thereof, such a finding is unsupported by the record. It is also in direct conflict with the provisions of the policy in this case (Exhibit "A", Tr. 292, Page 4, Paragraph 9, Last Sentence) which provides expressly that "bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder." It is, therefore, respectfully submitted that the record does not support any factual determination that Louis Porter was insolvent at the time that the judgment was rendered against him.

4. The defect in timeliness of the purported cancellation was not the only or even the major defect in the purported cancellation.

As the record clearly reflects, when Mr. Greenspan first received the purported notice of cancellation, the *initial* objection that he made was that Nationwide itself had not canceled the policy, that the finance company had attempted to do so, and that this was defective (Tr. 59 & 61). Mr. DiBlasi's answer to this was that he was merely following the instructions of the underwriting department, taking their word for the cancellation and doing what they told him to do. It was only later that Mr. Greenspan discovered the *Cannon* case and promptly advised Nationwide thereof, while they had abundant opportunity to act thereon (Tr.

67). On cross-examination, Mr. Greenspan reiterated that the company had refused to investigate into his specific claim that the cancellation was defective because sent by the wrong party (Tr. 103). No representative of Nationwide offered any denial or contrary testimony at the trial; so that these facts are undisputed and uncontradicted in the record, accepted by the jury and affirmed by the Appellate Division.

When this case came before Judge Nolan (*Rotsettis* v. *Nationwide Mutual Insurance Company*, 58 Misc. 2d at 670), his specific holding was that there was no power of attorney or authority given to Premier to cancel. Judge Nolan found that, in addition, there was a defect in timeliness. But the primary ground of his decision was the original objection by Mr. Greenspan that the notice was sent by the wrong party. This decision was affirmed on appeal (31 App. Div. 2d 722 (2d Dept. 1968)), and leave to appeal denied by this Court.

Thus, it is the law of this case and, indeed, undisputed by Nationwide, that they were wrong on all counts. They were wrong as to the alleged authority of Premier to send a notice. They were wrong as to the timeliness of the notice. Indeed, they were also wrong in that there was no proof of filing of any alleged cancellation as required by statute (*Orisini* v. *Nationwide*, 35 A.D. 2d 238 (3rd Dept. 1970)). Nor could they prove that the premium finance agreement itself had ever been properly assigned to Premier (Tr. 223; see Exhibit 16, Tr. 290). Thus, the issue of timeliness was only one of several defects in the purported cancellation, more than one of which were brought to Nationwide's attention immediately, and only as to *one* of which (timeliness) did Nationwide attempt to explain its conduct by reliance on the opinion of its uninformed house counsel. The failure of Nationwide to investigate into the authority of the sender of the purported notice of cancellation was condemned by their own expert (Tr. 185-87), as well as by plaintiff's experts. It is made even

more glaring and wrongful by the fact that Nationwide at all times had in its possession the financed premium endorsement on its own form (Exhibit "A", Tr. 292) which specifically required that cancellation be by the company itself.

All of the foregoing is intended to demonstrate what the jury properly found as a fact, namely, that timeliness was not the sole issue as to the impropriety of the cancellation and that Nationwide never made a good faith attempt to investigate or resolve the issue of cancellation or to give the insured's interest equal consideration with its own.

To deprive the plaintiff in this case of the jury's findings on these issues is to deprive him, in effect, of his right to trial by jury. As this court noted in *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29 (1944), "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable," Id. at 35. See also *Kozar* v. *Chesapeake & Ohio Ry. Co.*, 320 F. Supp. 335, 357 (W.D. Mich. 1970), mod., 449 F.2d 1238 (1971). By so doing in this case the New York Court of Appeals denied plaintiff his seventh amendment rights and his right to due process of law as well.

B. Petitioner was Denied Equal Protection Under the Fourteenth Amendment.

In the instant case, as noted by the trial judge in his opinion, 62 Misc. 2d 692:

> ". . . the defendant herein failed to introduce any proof to overcome the presumption that Porter had been damaged by the mere entry of the judgments against him and to the extent thereof. Nor did the defendant attempt to show that Porter was insolvent at the time and thus sustained no damage (see Young v. American Cas. Co. of Reading, Pa., 416 F.2d 906

[2 Cir., 1969]; Brockstein v. Nationwide, 417 F.2d 703 [2d Cir., 1969])."

Notwithstanding the record which failed to show either that this question had ever been submitted to the jury upon a proper pleading by the defendant, Nationwide, or to disclose a single unpaid bill or default by Louis Porter on any obligation of any kind, except for Nationwide's *assumption* that he had defaulted in the payment of a premium installment (R. 195) the New York Court of Appeals determined to treat Porter as if he were a de-facto insolvent as set forth in Point A3, *supra*.

The record, in addition to containing no derogatory evidence as to Porter's financial standing, affirmatively showed him to be an apartment dweller, owning his own car, possessing a permanent full-time job as a gas station attendant, and as far as can be determined from this record, without a single unpaid bill. Based on this state of the record, the New York Court of Appeals refused to apply the general rule in New York (*Hennegan* v. *Merchants Mutual Insurance Co.*, 21 A.D. 2d 12 (1st Dept. 1968) that entry of judgment establishes the amount of injury to a solvent defendant. It is respectfully submitted that the action of the New York Court of Appeals denies equal protection to those of modest circumstances, since it is clear from the court's opinion that a worthy, solvent plaintiff would have no burden whatever in the trial court as compared to the burden placed on this plaintiff nearly fifteen years after the event to establish his solvency at the time of the fatal accident. Federal courts considering this question have invariably rejected this view (*Lee* v. *Nationwide Mutual Insurance Co.*, 286 F. 2d 295, 4th Circuit); *Smoot* v. *State Farm Mutual Auto Insurance Co.*, 299 F. 2d 525 (5th Circuit); *Southern Farm Bureau Casualty Insurance Co.* v. *Mitchell*, 312 F. 2d 485 (8th Circuit); *Young* v. *American Casualty Co.*, 416 F. 2d 906 (2d Cir.). See also *Gray* v. *Nationwide Mutual Insur-*

ance Co., 422 Pa. 500. As pointed out in the dissenting opinion of Judge Breitel, 30 NY 2d at 449-50 the rule of cases such as *Bourget* v. *Geico*, 456 F. 2d 282 (2nd Circuit) and *Harris* v. *Standard Accident Insurance Co.*, 297 F. 2d 627 (2nd Circuit) is "limited to insureds, dead and leaving no assets, or discharged in bankruptcy and insolvent at the time that the excess judgment was rendered." There was no evidence in this case, nor even any contention that Louis Porter was dead, bankrupt, or insolvent at the time the excess judgment was rendered. Accordingly, Porter, and therefore his receiver, was entitled to equal protection of law, that is, application of the general rule for solvent plaintiffs (*Hennegan* v. *Merchants Mutual Insurance Co., supra*). The arbitrary distinction created by the New York Court of Appeals between the poor and the wealthy plaintiff in this situation is utterly untenable and completely in violation of petitioner's right to equal protection under the law and to due process of law. Fundamental fairness requires that in the absence of proof or pleading to the contrary, petitioners should be treated exactly the same as any other solvent plaintiff.

Conclusion

For the reasons hereinabove set forth it is respectfully urged that a writ of certiorari to the New York Court of Appeals should be granted.

It is respectfully noted that if petitioner prevails only on the first issue herein raised, he will be entitled to judgment in his favor and the reinstatement of the jury verdict as to liability. Insofar as the issue of alleged insolvency is concerned, if petitioner prevails in this court on that issue, he will be entitled to his judgment and the prompt payment thereof.

Respectfully submitted,

JOEL MARTIN AUBNOU
Counsel for Petitioner

Appendix Exhibit "A"

2. No. 531. 71

Gerald Gordon, as receiver of the rights and assets of Louis Porter,

Respondent-Appellant,

vs.

Nationwide Mutual Insurance Company,

Appellant-Respondent.

BE IT REMEMBERED, That on the 13th day of December in the year of our Lord one thousand nine hundred and seventy-one, Nationwide Mutual Insurance Company, the appellant-respondent in this cause, came here unto the Court of Appeals, by Benjamin H. Siff, its attorney-, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Gerald Gordon, as receiver of the rights and assets of Louis Porter, the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Greenspan, Aurnou & Davis, his attorneys.

Which said Notice of Appeal and return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Benjamin H. Siff, of counsel for the appellant-respondent, and by Mr. Joel Martin Aurnou, of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed

from herein be and the same hereby is reversed, with costs, and the complaint dismissed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office
Albany, June 1, 1972.

I HEREBY CERTIFY, that the preceeding record contains a correct transcript of the preceding record contains in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk.

COPY BOUND TO

Appendix Exhibit "B"

WU
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Telegram

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ZCZC 056 Collect Albany NY 29 819A Edt 1972 Sep 29 AM 10 38 PMS Greenspan Aurnou & Davis

1 No Broadway White Plains NY

Gordon v Nationwide Mutual Ins Co Motion for reargument &c. Denied

Raymond J Cannon Clerk Court of Appeals Albany NY

This is the only document received by Petitioner relative to the motion for re-argument.

TOO CLOSE IN CENTER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. .....

GERALD GORDON, as receiver of the rights and assets of Louis Porter,

Plaintiff-Respondent-Appellant,

against

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant-Appellant-Respondent.

AFFIDAVIT CERTIFYING SERVICE

I, Joel Martin Aurnou, being first duly sworn according to law, depose and say that I have on this day of December, 1972, mailed a copy of the attached petition for writ of certiorari to Benjamin H. Siff, Esq., Attorney for Respondent, Nationwide Mutual Insurance Co., 233 Broadway, New York, N. Y.

.....

JOEL MARTIN AURNOU

Sworn to before me and subscribed in my presence this day of December, 1972.

.....

Notary Public

FILE COPY

SUPREME COURT, U. S.
FILED
JAN 17 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-934

GERALD GORDON, as receiver of the rights and assets of Louis Porter,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BENJAMIN H. SIFF,
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THOMAS R. NEWMAN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-934

GERALD GORDON, as receiver of the rights and assets of Louis Porter,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Introductory

This is an action involving a dispute between a liability insurance carrier and the receiver of the assets of its insured bottomed on a claim of bad faith on the part of the carrier in its dealings with the insured.

Statement

The relevant facts are set forth in the opinions delivered by the Court of Appeals of the State of New York consisting of a majority opinion written by Judge Bergan, a concurring opinion written by Chief Judge Fuld, and a minority opinion written by Judge Breitel. Accordingly, the facts need no further elaboration.

Since petitioner has not annexed a copy of the opinions to his petition, for the convenience of the Court we annex the opinions as an appendix hereto.

There is No Reason to Grant the Writ

The facts demonstrate that this case involves no more than a determination by the highest court of the State of New York that there was not sufficient evidence to support a finding of claimed bad faith on the part of a liability insurance carrier in its dealings with its insured.

The case is among the legion in which state appellate courts have set aside and vacated jury verdicts and dismissed actions on the ground that there was not adequate evidentiary basis to support the claim or the jury's verdict. It is the familiar rule that such determinations do not violate any constitutional rights and present no questions warranting review by this Court.

Petitioner's unhappiness at the result is not a sufficient predicate for certiorari. It is the time-honored rule that the purpose of granting certiorari is

> "[t]o bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." (*Magnum Co.* v. *Coty*, 262 U.S. 159, 163)

The rule is no different when the party is defeated in a state appellate court.

There is no basis for granting the writ and the petition should be denied.

Dated: New York, N.Y., January 12, 1973.

Respectfully submitted,

BENJAMIN H. SIFF,
Attorney for Respondent.

THOMAS R. NEWMAN,
Of Counsel.

APPENDIX

Opinions by the Court of Appeals of the State of New York

[30 NY 2d 427]

GERALD GORDON, as Receiver of the Rights and Assets of Louis Porter, Respondent-Appellant, *v.* NATIONWIDE MUTUAL INSURANCE COMPANY, Appellant-Respondent.

Argued February 9, 1972; decided June 1, 1972.

BERGAN, J. Recovery in this action on behalf of the insured Louis Porter by his receiver against the insurer Nationwide Mutual Insurance Company rests on a breach of good faith in the performance of its liability insurance contract by the company in managing the defense of liability claims against Porter.

The claimed breach of the implied obligation of the insurer to perform its contract of insurance in good faith rests on its refusal to settle negligence claims against Porter within the policy limits of $20,000.

The refusal, in turn, was based on the insurance company's assertion the policy had been canceled. Following on this assertion, the company withdrew from the defense of the negligence actions and refused to settle the claims within the policy limits. Porter ignored a notice of application by the plaintiffs in those actions to take inquests, served personally on him, and defaulted. The inquests, in turn, became the basis of Porter's receiver's present judgment against Nationwide. That judgment is for $259,058.87, over twelve-and-a-half times the policy limit.

Porter himself breached his contract to pay installments to Premier Credit Corporation which had financed on his behalf the premium for Nationwide's coverage, and it was this conceded breach of his premium financing contract,

and the notice of nonpayment received by Nationwide from Premier as Porter's agent, which led Nationwide to assert that the policy had been canceled and coverage terminated.

A "Notice of Cancellation", following Porter's failure to comply with his contract with Premier to pay for Nationwide's coverage, was sent by mail by Premier both to Nationwide and Porter. On locating this notice in its files Nationwide, which had undertaken the defense of the negligence actions, told attorneys for claimants against Porter that it regarded the policy as canceled and would not defend Porter or be responsible for resulting judgments.

It may be assumed for the purpose of this appeal that Nationwide was wrong as a matter of law in its assertion that Porter's uncontroverted default on his premium contract had effectively canceled the policy. But this does not make Nationwide liable for acting in bad faith.

More than an "arguable case" of coverage responsibility must be shown before liability may be imposed for breach of an implied covenant to act in good faith in denying coverage (*Sukup* v. *State of New York*, 19 N Y 2d 519). The holding in that case embraced a determination that the carrier was wrong as a matter of law in denying coverage, i.e., that there was coverage.

It was observed (p. 522): "The record in this case shows that the carrier was wrong and the insured right as to coverage, as the Workmen's Compensation Board found. The record does not show any gross disregard for its policy obligation by the insurer in asserting noncoverage. The record shows merely an arguable case in which the carrier was held wrong. That is not enough to impose a liability beyond the terms of the contract."

The notice of cancellation was mailed by the finance company to Porter November 10, 1961 with an effective date of cancellation stated to be November 23. This was not the 10 days' notice with 3 days added for mailing re-

quired by section 576 (subd. 1, par. [b]) of the Banking Law, governing cancellation by a "premium finance agency". Although it gave 13 days' notice, the day of mailing should have been excluded. The accident in which Porter was involved occurred November 28, 1961, well beyond 14 days after the mailing of the notice of cancellation to him on November 10.

The accuracy of the computation of days was debated between counsel at the trial of this present action, although appellant carrier does not argue on the merits in this court that the notice given to it and the insured by the finance agency technically met the time requirements of the Banking Law.

There is a large and very fundamental difference, however, on the effect of this one-day technicality in notice of cancellation flowing from Porter's breach of contract, between the legal effect of this purported cancellation of insurance and the asserted failure of Nationwide to act in good faith toward Porter when it refused to settle the case within the policy limits of $20,000.

If, as it now appears, Porter's finance company was a day short in the notice of cancellation it sent for Porter's breach of contract, the normal consequence would be that the policy remained in effect, uncanceled, and Nationwide continued liable for $20,000.

Indeed, Nationwide has been required in an earlier phase of this present action on behalf of judgment creditors in the negligence actions who were original coplaintiffs to pay its policy limits (58 Misc 2d 667, affd. 31 A D 2d 722) and that is not open in this appeal.

This was the holding in *Cannon* v. *Merchants Mut. Ins. Co.* (35 Misc 2d 625), the effect of which was debated between counsel for Nationwide and counsel for the plaintiffs in the actions against Porter. But a good faith belief in the cancellation of the policy would not only depend

on the view the insurer took of the legal question, but also its view of the facts of Porter's default in payment. In *Johnson* v. *General Mut. Ins. Co.* (24 N Y 2d 42) not only was the notice of cancellation not sufficient in time, but in fact the insured had not defaulted in payment (p. 47).

Therefore, the question of breach by Nationwide of its good-faith obligation to perform its contract of coverage cannot be walled off from the actualities in the chain of events which Porter set in motion by failure to perform his contract with his finance company to pay the premium.

And Nationwide's bad faith must be shown to be so great as to require it, not only to pay the policy limits, but to pay the essentially punitive sum of $250,000.

No such remarkable showing of bad faith is made in this record to warrant submission of the case to a jury for imposition of liability vastly beyond the policy limits on any theory—either breach of contract or negligence.

Nationwide's counsel advised it that the policy had properly been canceled for Porter's breach. Counsel testified on the trial, not only that this had been his professional opinion when advising the company, but that it continued to be his opinion at the trial of the present action.

Counsel for the plaintiffs in the negligence actions against Porter argued with the insurer's counsel that the law was the other way—i.e., the notice of default given by the finance company was a day short and cited *Cannon* v. *Merchants Mut. Ins. Co.* (35 Misc 2d 625, *supra*). The insurer's counsel replied he believed that case wrongly decided, and that the policy had properly been canceled well before the accident had occurred.

It would be an extraordinary result to hold a client guilty of breach of good faith, with large punitive damages, because it acts on advice of counsel—even mistaken advice—about the precedential stature of a single case in the Miscellaneous Reports. It would be even more extraordinary

if liability could be imposed on a client for breach of good faith in following counsel's advice because an adversary lawyer disagrees with the legal merits of the advice given. And the acerbity of the argument has itself no legal consequence.

When the actual documents governing the relations between Porter, his finance company Premier, and Nationwide, are examined, it is to be observed that Premier was vested by Porter with a very large measure of control over the continuance of Nationwide's policy. Porter assigned to Premier "all rights" that he had under the policy, and in case of default in installment payments, Premier was appointed Porter's agent to "request cancellation". This was a normal and reasonable consequence since Premier was assuming financial arrangements for the premium.

The indorsement in the policy, binding on Porter, "specifically directs" Nationwide to honor any request for cancellation made by Premier "just as though such requests were in fact made" by Porter. The indorsement also provided that "if the Company [Nationwide] cancels the policy it will be with advance notice to the Policyholder and the Lender".

It seems obvious this kind of direct cancellation by the insurer itself requiring notice to both Porter and Premier is not the kind of cancellation requested by the finance company on Porter's behalf as Porter's agent for a failure to pay finance installments. This distinction is to be seen in the statute governing the right of a "premium finance agency" to cancel an insurance contract by giving notice (Banking Law, § 576, subd. 1, pars. [a] & [b]).

The "Notice of Cancellation" sent by Premier on November 10, 1961 was mailed both to Porter and Nationwide and, reciting that Porter was in default, it could scarcely be treated by the insurer as other than election by Porter's agent to request cancellation. All this has a bearing on

the good faith of the carrier in accepting its counsel's view it was not on the risk when the accident of November 28, 1961 occurred.

Furthermore, and significant on the issue of good faith of Nationwide, it was Premier's error of one day in computing the time of the notice of cancellation for Porter's conceded default, and not Nationwide's, that fell short of the statutory requirement—a requirement which the statute placed directly on Premier. Nationwide failed to take note of the shortage of time in Premier's notice to it and of the fact that Premier had mailed the notice to Porter rather than served it personally. If served personally it would have been timely (Banking Law, § 576, subd. 1, par. [a]).

This was the error of Premier in following the statute and not of Nationwide which, like Porter, was on the receiving end of Premier's notice. It would be a harsh result indeed to impose the punitive consequence of a $250,000 judgment on Nationwide for this.

Certainly no harm was done to anyone—Porter or the claimants against him—by Nationwide's initial undertaking of the defense of the negligence actions before it discovered the notice of cancellation in its files. Nationwide had during this period received an offer of settlement of the actions within the policy limits which it did not accept, but it had Porter's report of the accident disclaiming responsibility and bad faith may not possibly be inferred from its failure to settle for the extent of its coverage at that early and indecisive stage of the litigation.

Nor had Porter made a request at any time to Nationwide that the claims against him be settled within the policy limits. Such a request, or an expressed desire by an insured that the insurer exhaust the limits of coverage, is a significant factor in some of the cases where the insurer's liability has been permitted to exceed the amount of coverage.

Its decision to withdraw from the defense of the negligence actions and its refusal to settle within the policy limits after that decision are both dependent on the assertion the policy had been canceled and both decisions are interrelated. It was on the basis of these decisions, charged by Porter's receiver to have been made in bad faith, that the judgment of $250,000 has been entered against Nationwide. No bad faith in justification of that judgment is established under this record.

The theory of Porter's receiver's claim of damages is that the large judgments resulting from the inquests have had some actual adverse economic or personal effect on Porter. It is alleged in the complaint that Porter was "damaged" by the judgments to the extent that the receiver of his "rights and assets" may recover the inquest-determined amounts on his behalf; that Porter "became indebted" to the negligence claimants and that the receiver is entitled to recover "on behalf of Louis Porter", and in this court the receiver's brief describes the receiver's action as "Porter's claim asserted for Porter".

It would not be easy to demonstrate greater indifference to the judgments or other consequences of his negligent driving than that displayed by Porter in this case. From the moment Nationwide advised him that because of his conceded breach of his finance contract for the premium, it would withdraw from the defense of the case, Porter showed no interest whatever in the consequences to him or to anyone else.

This complete indifference to the obligations under his contract, or to the claims based on his negligence, distinguished the case sharply from those decisions in which policy limits have been exceeded because of the bad faith of an insurer in managing the defense of claims. Porter's situation is thus similar to that considered in *Fidelity & Cas. Co.* v. *Gault* (196 F. 2d 329 [5th Cir.]).

Both Nationwide and the attorneys who had been retained by it to appear for Porter advised him by letters, November 19, 1963, that since his policy had been canceled November 23, 1961, before the accident, they would withdraw from the defense of his action and that he should retain other lawyers, a procedure which the lawyers retained by Nationwide told him they would facilitate. Porter ignored this notice.

He defaulted, both on an application to the court by his attorneys to withdraw from the case, and on an application by the attorneys for the plaintiffs in the negligence cases against him to take inquests. Service of both of these notices was made personally on Porter by direction of the court. He showed no concern about either motion.

It is against this background of utter indifference to his contractual obligations under the insurance contract that the "bad faith" of Nationwide in performance of its part of the contract with Porter must be measured.

A party indifferent to his contractual obligations arising from a liability insurance policy—in "Porter's claim asserted for Porter"—has succeeded in imposing a heavy punitive judgment on the other party to the contract for not performing it in good faith.

The rules governing the measure of damage chargeable to a liability insurer on failure, in violation of its contract, to defend the insured or to settle a claim within policy limits, are rather well established and understood in the profession. There is essentially no difference of view within the court as to what the rules are.

For a breach of the obligation to defend, the measure of damage is the cost of defense to the insured and the amount of recovery, if any, against the insured within the policy limits.

For a breach of contract based only on a failure to make reasonable settlement of a claim within the policy limits,

damages are measured by the policy limits. For a breach of implied conditions of the contract to act in its performance in good faith in refusing to settle within the policy limits, the damages may exceed the policy limits.

The punitive nature of damage for the bad faith breach of contract is a characteristic of the law of contracts generally, and is not a peculiarity alone of the contract of liability insurance. In every contract "there exists an implied covenant of good faith and fair dealing" (*Kirke La Shelle Co.* v. *Armstrong Co.* (263 N. Y. 79, 87).

The general application of the rule in New York is illustrated in *Van Valkenburgh, Nooger & Neville* v. *Hayden Pub. Co.* (30 N Y 2d 34); *Underhill* v. *Schenck* (238 N. Y. 7), and *Wilson* v. *Mechanical Orguinette Co.* (170 N. Y. 542).

But a punitive measure of damages is not applied routinely for breach of contract; and bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract.

An illustration of a refusal of the court to accept bad faith as a ground to disregard the usual rule of damage flowing from a breach is *Van Valkenburgh* (30 N Y 2d 34, *supra*) where, in an arguable case of defendant's acting in self-interest, the damages were limited to those flowing directly from a breach of a condition of the agreement and not allowed to exceed that measure.

No authoritative case in New York has ever allowed recovery against an insurer beyond the policy limits where the insured had in fact failed to make payment under a premium financing contract and the insurer's bad faith was a mistaken belief the policy had lawfully been canceled for this reason. The decision in *Johnson* v. *General Mut. Ins. Co.* (24 N Y 2d 42, *supra*), where the insured was actually not in default in premium payment and the policy had been wrongfully canceled, is a good illustration of the rule.

Appendix.

In *Brassil* v. *Maryland Cas. Co.* (210 N. Y. 235) there was an undisputed policy of coverage, a refusal to settle within its limits, a judgment in the negligence claim which exceeded the policy, a refusal by the insurer to appeal and a successful appeal prosecuted by the insured. The issue before the court was the insurer's obligation to pay the reasonable expenses of appeal, an obligation which was found in the absence of good faith of the insurer (p. 242). The absence of good faith there bears no relevancy to the present case.

In *New York Cons. R. R. Co.* v. *Massachusetts Bonding & Ins. Co.* (193 App. Div. 438, affd. 233 N. Y. 547) coverage was not in dispute. The insurer concededly managed the trial of the insured's case in its own interest in such a manner as, in bad faith, to deprive the assured of a right of subrogation (193 App. Div., p. 444). This case also has no relevancy to the present case.

And in *McAleenan* v. *Massachusetts Bonding & Ins. Co.* (232 N. Y. 199) the failure of defendant to move for nonsuit and the unanimous affirmance by the Appellate Division were held to preclude this court from examining the issue of damage.

Nor do the cases in other jurisdictions based on bad faith refusal to settle and permitting policy limits to be exceeded give greater support to plaintiff's claim here than the New York decisions. It is fair to say as to those cases, too, none has gone as far as the present case in allowing damage to an insured whose act of default became the basis of the insurer's assertion of noncoverage.

A good illustration of this distinction is in *American Fid. Fire Ins. Co.* v. *Johnson* (177 So. 2d 679 [Fla.]) where, as in *Johnson* v. *General Mut. Ins. Co.* (24 N Y 2d 42, *supra*) in New York, the premium for renewal of policy had actually been paid but through mishandling by a broker under an arrangement made by the insurer's agent,

the insurer treated the policy as canceled. A refusal to settle was there treated as a breach of good faith and the policy limit was penetrated.

A similar problem was considered in *Blakely* v. *American Employers' Ins. Co.* (424 F. 2d 728 [5th Cir.]). There, although the premium had actually been paid, an agent of the company received a notice that it was canceled for nonpayment. The company's denial of coverage was deemed wrongful and damage was permitted beyond the policy limits.

In *Landie* v. *Century Ind. Co.* (390 S. W. 2d 558 [Mo.]) the policy concededly covered plaintiffs who had not themselves contributed to the coverage problem and the issue of good faith on the refusal to settle was held to be an open fact question. In *Bowers* v. *Camden Fire Ins. Assn.* (51 N. J. 62) there was conceded coverage and a "selfish" refusal by the insurer in its own interests to settle.

In *Western Cas. & Sur. Co.* v. *Herman* (405 F. 2d 121 [8th Cir.]) the court treated the stipulation between the parties as having "conclusively established" the insurer's lack of good faith (p. 123). And in *Liberty Mut. Ins. Co.* v. *Davis* (412 F. 2d 475 [5th Cir.]) the insurer's refusal to settle in a case of conceded coverage was based on its own self-interest—a fear of a risk to itself of liability in other actions. This was regarded as a breach of good faith.

Finally, in *Comunale* v. *Traders & Gen. Ins. Co.* (50 Cal. 2d 654) the court accepted without differential analysis, as a predicate for its decision, the "wrongful refusal" of the insurer to settle a claim. These cases are all distinguishable from the present case.

Where there is a breach of the terms of a contract of insurance, not found to have been made in bad faith, the damage for refusal to settle is limited, both in New York and elsewhere, by the policy coverage or, additionally, to that and the cost of defense where there is also a refusal

to defend (*Grand Union Co.* v. *General Acc., Fire & Life Assur. Corp.*, 279 N.Y. 638; *Best Bldg. Co.* v. *Employers' Liab. Assur. Corp.*, 247 N.Y. 451; *Seward* v. *State Farm Mut. Auto Ins. Co.*, 392 F. 2d 723 [5th Cir.]; *Hendry* v. *Grange Mut. Cas. Co.*, 372 F. 2d 222 [5th Cir.]; *Myers* v. *Farm Bur. Mut. Ins. Co.*, 14 Mich. App. 277).

The order should be reversed and the complaint dismissed, with costs.

Chief Judge FULD (concurring). I agree with Judge BERGAN that the record before us is devoid of any evidence that defendant Nationwide acted in bad faith and, consequently, I too am for reversal and dismissal of the complaint. However, even were we to assume the existence of bad faith on the insurer's part in refusing to settle within policy limits, I would still favor dismissal of the complaint on the ground that there was no showing that the insured, on whose behalf the plaintiff receiver is suing, suffered any actual damage.

There are, as noted in the dissenting opinion (pp. 448, 449), decisions in some jurisdictions which hold that an excess judgment entered against the insured measures the damages suffered by him even though he may be insolvent and the judgment uncollectible. I find such a rule both unreasonable and unfair. Recovery against an insurer should not be sanctioned or upheld as punishment or as a punitive measure. In my view, an insured is not harmed and, by that token, suffers no damage when an uncollectible judgment is entered against him. (Cf., e.g., *Bourget* v. *Government Employees Ins. Co.*, 456 F. 2d 282; *Harris* v. *Standard Acc. & Ins. Co.*, 297 F. 2d 627, 631-632, cert. den. 369 U. S. 843.) As the United States Court of Appeals for the Second Circuit wrote in *Harris* (297 F. 2d, at pp. 631-632),

> "The law of New York requires proof of actual loss to support recovery for a tort of this type. The pur-

pose of tort damages is to compensate an injured person for a loss suffered and only for that. The law attempts to put the plaintiff in a position as nearly as possible equivalent to his position before the tort. Recovery is permitted not in order to penalize the tortfeasor, but only to give damages 'precisely commensurate with the injury.' [*Gressman* v. *Morning Journal Assoc.*, 197 N. Y. 474, 480.]"

And, just a few months ago, that same court, relying upon its decision in *Harris*, declared (per FRIENDLY, C. J.) that "what gives rise to the [insurer's] duty and measures its extent is the conflict between the insurer's interest to pay less than the policy limits and the insured's interest not to suffer liability for any judgment exceeding them. In the rare instance where the insured has no such interest, there can be no conflict and the duty does not arise." (*Bourget* v. *Government Employees Ins. Co.*, 456 F. 2d, at p. 285.)

In the case before us, it is clear beyond peradventure that the insured, in light of his financial standing and economic condition, could not have had either the interest or the motivation to prevent entry of a judgment in excess of policy limits. So far as appears, the insured's only asset was his eight-year-old automobile which had been involved in the accident. He had been a gas station attendant, living in a basement apartment in a low rent area and, quite obviously, had no real credit standing in the community which could have been impaired or affected by the existence of a judgment against him. In point of fact, for all that appears, he may not even be alive; it is acknowledged that he has disappeared and that his whereabouts are completely unknown. The suggestion that he may come into an inheritance or that he may embark on a successful business career ignores reality.

I do not suggest—although there are a number of decisions so holding—that an insured must pay the judgment before he, or another on his behalf, is able to proceed against a bad faith insurer. However, there must be some showing that he has been damaged. In the case before us, there is not the slightest evidence, or even intimation, that the insured was harmed by the judgment, that he had any assets which were imperiled or that either his reputation or credit was impaired.

In short, the complaint in this case should be dismissed not only because there is no evidence that the insurer acted in bad faith but also because there is no proof that the insured suffered any damage.

Breitel, J. (dissenting). In an action by the receiver of an insured against his automobile liability carrier for negligence and breach of contract in refusing to defend or settle wrongful death and personal injury claims within policy limits, there are cross appeals. The receiver recovered, after a jury trial, compensatory damages of $201,129.17, equal to the excess judgments awarded in prior tort actions against the insured. Upon motion to the trial court an award of punitive damages in the additional amount of $300,000 was set aside. The Appellate Division, by a divided court, affirmed. The dissenters did not disagree with the findings of the carrier's bad faith, but disagreed as to the measure of damages. The significant issues turn on the proper measure of damages, and alleged errors on requests to charge.

Plaintiff receiver had been appointed in supplementary proceedings to enforce the excess judgments recovered against the insured Porter, a former garage mechanic who apparently became unlocatable during the litigation. The receiver, in effect the judgment creditors, based his claims on the carrier's breaches of duty towards its insured.

Appendix.

There should be a reversal and direction for a new trial. The court should not have charged that if liability is found the damages are measured as a matter of law by the amount of the excess judgments. Given the economic condition of the insured the damages should have been realistically assessed by the jury under instructions setting forth the factors governing the damage sustained by the insured from the excess judgments rendered against him.

In August, 1961 Louis Porter, the insured, financed the annual renewal of his Nationwide automobile liability policy through the Premier Credit Corporation. On November 28, 1961 Porter's 1953 sedan collided with the rear of a vehicle occupied by Mr. and Mrs. Rotsettis and a passenger, Michael Panteloglu. The Rotsettises died as a result of the accident and the passenger was severely injured. Porter, some six days later, notified Nationwide and attributed the rear-end collision to Mr. Rotsettis, the driver of the impacted car. He also advised Nationwide that he had included the name of a witness to the accident in his report to the State Department of Motor Vehicles.

In December, 1961, Leon Greenspan, a lawyer representing the Rotsettises' estates, wrote a claim letter to Porter who forwarded it to Nationwide. From December, 1961 to July, 1962 Mr. Greenspan made several proposals to settle all claims, including the Panteloglu claim, within the policy limits of $20,000. When no offer resulted, the estates sued Porter in July, 1962. He forwarded the papers to Nationwide. (Panteloglu sued about two years later.) After some delay and prodding by Mr. Greenspan Nationwide served an answer and demand for a bill of particulars in September, 1962. Again, Mr. Greenspan offered to settle for the policy limits. Nothing happened.

In November, 1962, 11 months after notice of the accident, Nationwide notified Porter and claimants' lawyer that it was disclaiming because Porter's finance company had

sent a notice of cancellation dated and served November 10, 1961, prior to the accident. The precipitating cause was Nationwide's belated discovery in Porter's file of a policy endorsement of finance premium and a purported notice of cancellation by the finance company. The endorsement empowered Nationwide to honor "requests for cancellation" tendered by the finance company. The endorsement continued: "If the Company cancels the policy it will be with advance notice to the Policyholder". The notice of cancellation had been sent to Porter by the finance company, not Nationwide. Notably, the endorsement did not authorize the finance company to cancel but only to request cancellation, nor did the notice comply with the statutory 13-day advance notice requirements (Banking Law, § 576, subd. 1, par. [b]; *Johnson* v. *General Mut. Ins. Co.*, 24 N Y 2d 42, 48).

Claimants' lawyer brought his objections to Nationwide's attention, even citing a recent case (*Cannon* v. *Merchants Mut. Ins. Co.*, 35 Misc 2d 625) directly in point as to the timeliness of the notice of cancellation. Nevertheless, Nationwide evidently never inspected the premium finance agreement nor investigated the basis for cancellation by the finance company. Indeed, the finance agreement, the only document ever signed by Porter, was not located by Nationwide until four years later. With respect to the timeliness of the notice, Nationwide's lawyer admitted to claimants' lawyer that the facts in the case, *Cannon* (35 Misc 2d 625, *supra*), were substantially identical but he disagreed with the holding. He also admitted on the trial that he had offered no contrary authorities. Finally, claimants' lawyer asked Nationwide to bring a declaratory judgment action to resolve the matter, agreeing to withhold the claims until the issue was decided. Nationwide's lawyer dismissed the suggestion.

Eventually, in December, 1962, Nationwide moved to withdraw from the case and the estates applied for in-

quests. Its lawyer reportedly agreed that if the estates would not oppose withdrawal, Nationwide would withdraw its answer and not object to inquests, stating: "We don't care what you do to our insured."

The inquests followed and default judgments were entered against Porter on the Rotsettises' claims for $179,462.50 and in a parallel litigation on the Panteloglu claim for $35,000. Notwithstanding the magnitude of the Rotsettis judgments, Nationwide refused to consider claimants' repeated proposal to settle all claims against Porter within policy limits. In an action severed from the present one the Rotsettis claimants, in their own right under section 167 of the Insurance Law, recovered the policy limits from Nationwide (*Rotsettis* v. *Nationwide Ins. Co.*, 58 Misc 2d 667). The conclusion in that action that the cancellation by the finance company was unauthorized and without proper notice was affirmed on appeal (31 A D 2d 722, mot. for lv. to app. den. 23 N Y 2d 646). As noted earlier, the present action was brought by a court-appointed receiver in supplementary proceedings to enforce the Rotsettis judgments against Porter, claiming on causes of action in his favor against Nationwide (see McKinney's Cons. Laws of N. Y., Book 7B [1971 Cum. Sup.], Supplementary Practice Commentary by Professor David D. Siegel to CPLR 5201, p. 17, and CPLR 5228, p. 118; *Matter of Kreloff* v. *Mendez*, 65 Misc 2d 692, also involving an action by a receiver in supplementary proceedings and a refusal to defend or settle by Nationwide).

On the trial, to establish negligence and bad faith in Nationwide's persistent refusal to defend or settle, witnesses called by plaintiff described the practice in the insurance industry. Gavin and Gochman each testified that it was industry practice to seek a declaratory judgment when a tort action is pending and a question of policy cancellation arises. Gochman stated that when disclaimer is based on cancellation it is customery to check the file for

the notice of cancellation, and examine it for timeliness. Invariably when doubt as to cancellation arose, outside counsel would be retained to sue for a declaratory judgment. Even defendant's expert, Carroll, when informed upon cross-examination that notice had not been sent by Nationwide and a valid cancellation disputed, conceded that in a case as serious as this no carrier would abandon its insured.

The court charged the jury that they could find for the plaintiff if the insurer negligently or in bad faith abandoned the defense and refused at all times to consider a continuing opportunity to settle within policy limits ($20,000). As a matter of law damages were fixed by the court as the amount of the judgments in the personal injury and wrongful death cases, with credit for $13,333.33 paid in the section 167 action. The court refused to charge on contributory negligence, or to leave the assessment of damages to the jury. The jury returned a special verdict in favor of plaintiff receiver finding negligence and bad faith by the insurer and an award equal to the excess judgments. The jury's award also included punitive damages for $300,000, which, as stated earlier, was stricken by the trial court on motion.

The insured's contract claim is posited both upon a breach of the express covenant to defend and the implied covenant of good faith not to impair the insured's interests. The doctrine that a liability insurer owes a duty of good faith to protect its insured, including the good faith consideration of opportunities to settle, because of its exclusive control in the management of claims has deep roots in New York (e.g., *Best Bldg. Co.* v. *Employers' Liab. Assur. Corp.*, 247 N. Y. 451, 453; *Brassil* v. *Maryland Cas. Co.*, 210 N. Y. 235, 242; *New York Cons. R. R. Co.* v. *Massachusetts Bonding & Ins. Co.*, 193 App. Div. 438, 444, affd. 233 N. Y. 547; *Brunswick Realty Co.* v. *Frankfort*

Ins. Co., 99 Misc. 639, 642*; see Note, Recent Developments in the Excess Judgment Suit, 36 Brooklyn L. Rev. 464; Note, Excess Judgments and the Bad Faith Rule, 36 Albany L. Rev. 698). Indeed, a recent amendment to section 40 of the Insurance Law imposes possible penalties upon insurers for "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear" (§ 40-d, as added by L. 1970, ch. 296, § 1).

Elsewhere it has been held that the insurer's duty attaches to all aspects of a claim from investigating it, through good faith consideration of opportunities to settle it, to prosecuting appeals (Ann., Insurer's Bad Defense—Liability, 34 ALR 3d 533; Ann., Liability Insurer—Refusal to Defend, 49 ALR 2d 694; Ann., Liability Insurer—Duty to Settle, 40 ALR 2d 168; Ann., Insurer's Withdrawal From Defense, 167 A. L. R. 243). Indeed, at least one jurisdiction would go further and with respect to the insurer's duty to settle would impose strict liability for refusal whether in good faith or not. The California Supreme Court, observing that it is the insured's justifiable expectation that the entire coverage be utilized to effect a settlement, would apparently hold the insurer strictly accountable for any excess judgment when, at the time of refusal, there was a possibility however slight that a verdict would exceed coverage (*Crisci* v. *Security Ins. Co.*, 66 Cal. 2d 425, 430-431; see, also *Marsango* v. *Auto-*

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* An interesting variation arises when the insurer defending an action brought by an assignee of insured contends that in good faith in refusing to settle the tort action is relied on insureds disclaimer of any responsibility for the accident. See *Pipoli* v. *United States Fid. & Guar. Co.* (38 A 2d 249) in which the court was sharply divided. The instant case, of course, involves an affirmed finding that there was bad faith in the refusal to defend and the effect of the refusal to settle, which alone might or might not have constituted bad faith.

mobile Club, 1 Cal. App. 3d 688; *Trahan* v. *Central Mut. Ins. Co.,* 219 So. 2d 187, 192-193 [C.A., La.]; *Herges* v. *Western Cas. & Sur. Co.,* 408 F. 2d 1157, 1161 [C.A., 8th]; Comment: Approaching Strict Liability of Insurer for Refusing to Settle Within Policy Limits, 47 Neb. L. Rev. 705; Comment: Insurer's Strict Liability for Entire Judgment, 13 S. Dak. L. Rev. 375).

Significantly, the authorities discussed thus far are concerned with the insurer who defends but in doing so advanced its own interests by compromising those of its insured. In this case, Nationwide compounded the wrong by completely removing itself from the case. It thus denied the insured not only his express contract right to a defense but also the implied right to have settlements considered in good faith. The wrong is the more egregious, bad faith having been found and the finding virtually compelled by the record. The consequences should not be less than when the insurer defends and wrongfully ignores opportunities to settle. The courts, whenever confronted with the issue, so hold.

True, the unjustified refusal to defend, even if in bad faith, will not cast an insurer in damages for an excess judgment in the absence of a wasted opportunity to settle. Thus, damages are generally then limited to the policy coverage, counsel fees, and other expenses of litigation (1 Long, Law of Liability Insurance, § 5.05D, p. 5-41; Ann., Liability Insurer—Refusal to Defend, 49 ALR 2d 694, § 10). When, however, as in this case, there is the persisting proposal to settle much larger claims within policy limits, the damage rule is not so narrow. Then almost all courts agree that the insurer's liability will extend to the excess judgment (e.g., *Western Cas. & Sur. Co.* v. *Herman,* 405 F. 2d 121 [C.A., 8th]; *Seward* v. *State Farm Mut. Auto. Ins. Co.,* 392 F. 2d 723 [C.A., 5th]; *Foundation Reserve Ins. Co.* v. *Kelly,* 388 F. 2d 528 [C.A.,

10th]; *Landie* v. *Century Ind. Co.*, 390 S. W. 2d 558 [C.A. Mo.]; *Comunale* v. *Traders & Gen. Ins. Co.*, 50 Cal. 2d 654; *Southern Farm Bur. Cas. Ins. Co.* v. *Logan*, 238 Miss. 580; *Myers* v. *Farm Bur. Mut. Ins. Co.*, 14 Mich. App. 277; *American Fid. Fire Ins. Co.* v. *Johnson*, 177 So. 2d 679 [C.A., Fla.]; *contra*, *Schurgast* v. *Schumann*, 156 Conn. 471, 489-491; *Mannheimer Bros.* v. *Kansas Cas. & Sur. Co.*, 149 Minn. 482, 485-487; see, generally, 1 Long, *op. cit.*, *supra*, pp. 5-42 to 5-44; Ann., Liability Insurer—Refusal to Defend, 49 ALR 2d 694, § 11).

In *Seward* v. *State Farm Mut. Auto. Ins. Co.* (392 F. 2d 723, *supra*) the insurer wrongfully refused to defend its insured in a wrongful death action. A default judgment was entered against the insured on the death claim for $57,000, an excess of $47,000 over policy limits. In the contract action by the insured against the insurer the issue was whether an insurer, failing to defend, is liable for the excess judgment in the absence of an opportunity to settle. The Federal Court of Appeals under constraint of the Florida cases reluctantly held that in addition to wrongful refusal to defend, an essential element was an opportunity to settle within policy limits. In the absence of a settlement proposal, under Florida law, the insurer could not be held liable for the excess judgment, because, the court said, "An offer to settle, even if unknown to the insurer, is objective evidence of the connection between the insurer's breach of contract and the amount of the damages" (392 F. 2d, at p. 727).

In *Comunale* v. *Traders & Gen. Ins. Co.* (50 Cal. 2d 654, *supra*) the insurer had refused to defend its insured or to accept settlement proposals within policy limits. A judgment, $15,000 in excess of coverage, was recovered against the insured on the tort claim. The tort judgment creditors took an assignment of the insured's cause of action against the insurer. The Supreme Court of California, in holding the insurer liable, stated:

"It is generally held that since the insurer has reserved control over the litigation and settlement it is liable for the entire amount of a judgment against the insured, including any portion in excess of the policy limits, if in the exercise of such control it is guilty of bad faith in refusing a settlement [citations omitted]. [Here], Traders never assumed control over the defense. However, the reason Traders was not in control of the litigation is what is wrongfully refused to defend Sloan, and the breach of its express obligation to defend did not release it from its implied duty to consider Sloan's interest in the settlement." (*id.*, p. 660).

"An insurer who denies coverage does so at its own risk, and, although its position may not have been entirely groundless, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract. Certainly an insurer who not only rejected a reasonable offer of settlement but also wrongfully refused to defend should be in no better position than if it had assumed the defense and then declined to settle. The insurer should not be permitted to profit by its own wrong." (*id.*, p. 660) (see, also, Ralston and Ballard, Insurer's Liability for Wrongful Refusal to Defend or Settle, 36 U. Mo. at K.C. L. Rev. 304).

In New York the consequences of an insurer's bad faith refusal to defend, with or without an opportunity to settle, has not arisen often. True, there are easily distinguished cases in which damages have been limited to attorney's fees and litigation expenses incurred by the insured (*e.g.*, *Brassil* v. *Maryland Cas. Co*, 210 N. Y. 235, *supra; Grand Union Co.* v. *General Acc., Fire & Life Assur. Corp.*, 279 N. Y. 638; *Goldberg* v. *Lumber Mut. Cas. Ins. Co.*, 297 N. Y. 148). But in every such case the insured had successfully defended the tort claim and no question of excess liability, therefore, arose. There were, in short, no excess tort judgments.

The rule regarding the insurer's liability for wasted opportunities to settle as a result of bad faith withdrawal from the defense should be followed. Certainly, in the instance of a solvent insured who has been denied the valuable right to have his insurer consider a strategic settlement within policy limits, the insurer should be held responsible for all the consequences of its conduct, and the measure of that loss orinarily would be the amount of the excess judgment, for exactly the reasons expressed by the California court (50 Cal. 2d 654, *supra*).

Nationwide does not quarrel with the general rule. Its position turns on the allegedly impecunious status of Porter, his alleged insolvency, and uncontradicted suggestions that he cannot be located. From these facts it urges that Porter sustained no harm from the excess judgments, and, therefore, his receiver should not recover damages automatically measured by the excess judgments.

Regardless of the insured's financial responsibility most courts automatically adopt the excess judgment as the measure of damages in the insured's contract action. In *Lee* v. *Nationwide Mut. Ins. Co.* (286 F. 2d 295 [C.A., 4th]) the court rejected the view that the mere existence of an outstanding judgment which may never be paid, is not legal injury. More acceptable, the court noted, "is the view treating the extant, unpaid judgments as injuries in themselves, their overburden measuring the pecuniary damages" (*id.*, at p. 298; accord, *Smoot* v. *State Farm Mut. Auto. Ins. Co.*, 299 F. 2d 525, 530 [C.A., 5th]; *Southern Farm Bur. Cas. Ins. Co.* v. *Mitchell*, 312 F. 2d 485 [C.A., 8th]; *Schwartz* v. *Norwich Union Ind. Co.*, 212 Wis. 593, 595; *Henke* v. *Iowa Home Mut. Cas. Co.*, 250 Iowa 1123, 1141-1144; *Sweeten* v. *National Mut. Ins. Co.*, 233 Md. 52, 56-57). That the insured was judgment proof or discharged in bankruptcy has been held not to affect recovery for the excess judgment (*Southern Fire & Cas. Co.* v. *Norris*, 35

Tenn. App. 657, 671-673; *Young* v. *American Cas. Co.*, 416 F. 2d 906, 911-912 [C.A., 2d]; *Robertson* v. *Hartford Acc. & Ind. Co.*, 333 F. Supp. 739; *Brown* v. *Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 689-693). In the *Brown* case the court noted than an insurer should not be able to use the limited financial responsibility of an insured to escape obligation, and that the excess judgment should set out the measure of damages (at pp. 690-691). The reasons for such a rule were best expressed in *Gray* v. *Nationwide Mut. Ins. Co.* (422 Pa. 500). To permit otherwise, the court observed, would allow insurers to benefit from the impecuniousness of an insured, encourage insurers to be less responsive to their contractual obligations, and overlook the basic economic fact that while the judgment remains outstanding the insured suffers "real damage" (*id.*, at pp. 505-506; accord, *Ammerman* v. *Farmers Ins. Exch.*, 22 Utah 2d 187, 189).

A few jurisdictions, some in distinguishable circumstances, have held that an insured is not injured and consequently suffers no damage by an uncollectible excess judgment (e.g., *Dumas* v. *Hartford Acc. & Ind. Co.*, 92 N. H. 140, 141; see 1 Long. *op. cit., supra*, § 5.22). Recently the court in *Bourget* v. *Government Employees Ins. Co.* (456 F. 2d 282 [C.A., 2d, per FRIENDLY, C. J.]) concluded that the estate of a deceased insured, insolvent at the time an excess judgment was entered, may not recover against the insurer for bad faith refusal to settle. The decision followed *Harris* v. *Standard Acc. & Ins. Co.* (297 F. 2d 627 [C.A., 2d], per LUMBARD, C. J., cert. den. 369 U. S. 843) involving an action by a trustee in bankruptcy of an insured insolvent at the time the excess judgment was recovered. The rule of these cases is evidently limited to insureds, dead and leaving no assets, or discharged in bankruptcy and insolvent at the time the excess judgment was rendered (see *Young* v. *American Cas. Co.*, 416 F. 2d 906 [C.A., 2d], *supra*, involving a bankrupt, solvent at the time the excess judgment was recovered).

Appendix.

The situation of the insolvent, the deceased, or the bankrupt insured presents an obvious difficulty, in contrast to the solvent insured. In many instances, measuring the damages by the amount of the excess judgments, especially when they are as great as in this case, incurs judicial resistance, even as against a carrier which has been proven to be grossly negligent and callously arrogant. Nevertheless, limiting damages to policy coverage and litigation expense, if any, incurred by an abandoned insured would be patently unjust. In most instances, if that were the rule, the carrier will not have risked more by its faithless conduct than it would have lost if it had performed its obligations faithfully. Moreover, it rewards the carrier for an irresponsible gamble, just because the insured is insolvent, dead, or bankrupt, a gamble that will often pay off, despite a breach of its duty to the insured and despite its indirect duty to the injured (see Insurance Law, § 167).

In the case of the insolvent, and in some instances, the deceased insured, there is no wholly satisfactory way to assess the economic harm wrought by the faithless carrier. This follows from the circumstance that as each increment of damage is paid, it becomes subject to the tort creditor's claim, with an excess, albeit reduced, judgment liability still outstanding. The sequential effect is not ended until the excess judgment is wholly discharged. Nevertheless, in extreme cases, and this is such a one, the magnitude of the excess judgment may be so great as to make unjust liability up to its full amount. As a matter of probabilities there may be little or no chance that the insured could ever be vulnerable to a judgment of such size. As for bankruptcy, the submission to bankruptcy to avoid the excess judgment may be a significant loss for those who are sensitive or for those who have a reasonable likelihood of ever requiring credit. Nevertheless, at least in

the instance of judgments of great magnitude, there may be no realistic escape from bankruptcy.

The discussion thus far begins to elicit the economic factors which should influence the measure of damages. The factors would include the age, economic status, economic prospects, skills, health, and any other matters presently existing which would be reasonably predictive of the insured's economic future, or that of his estate, if it were likely to receive assets or benefactions. The task is not easy, but it is not unusual (e.g., *Duane Jones Co.* v. *Burke*, 306 N. Y. 172, 192; *MacGregor* v. *Watts*, 254 App. Div. 904. These cases illustratively involved difficult projections of economic harm). A similar assessment is required when persons have been permanently injured or have been killed and the damage to their prospects or to their dependents is to be assessed (e.g., *Houghkirk* v. *Delaware & Hudson Canal Co.*, 92 N. Y. 219, 223-225; *Grayson* v. *Irvmar Realty Corp.*, 7 A D 2d 436; *Dimitroff* v. *State of New York*, 171 Misc. 635, 637-639; 13 N. Y. Jur., Damages, §§ 16 [at p. 441], 82-84).

Difficult or easy, such a rational and considered assessment is both fair and pragmatic. It is not as unfair as the imposition, automatically, of liability for the full amount of the excess judgment, even if it were a $1,000,000 judgment against an aged insured living on government beneficence, and suffering from a terminal illness. Nor is it as unfair as limiting recovery to the policy limits and litigation expense, if any, to a young person, impecunious in capital assets, but in the verge of embarking upon a professional or business career, to whom an overhanging judgment or bankruptcy might be an economic disaster.

Consequently, the better rule, in cases involving other than a solvent insured, would be for a trial court to instruct a jury with respect to the applicable factors, some of which have been suggested, bearing on the pecuniary and

tangible harm done to the insured and assess that harm to include the economic harm to the insured now and in the reasonably anticipated future, of the overhanging excess judgment. Included, too, would be any other tangible harms, such as the loss of the right to operate motor vehicles or to obtain employment or insurance.

A further comment is suggested. The fact that this action is by the receiver in supplementary proceedings and that he is the alter ego for the tort judgment creditors is of no moment. Judgment creditors may always reach the debtor's assets. There is no reason why they may not reach an asset, the instant causes of action, just because they arose out of the transaction in which they were injured. It is perverse to urge that they may not. Moreover, ultimate compensation to the claimants is also the mechanism for removing or alleviating what the court in *Lee* v. *Nationwide Mut. Ins. Co.* (286 F. 2d 295, 298, *supra*) described as the "overburden" sustained by the insured. Lastly, to reject recovery because behind the receiver stand the claimants as the real beneficiaries is to do violence to the statutes and principles extending remedies to judgment creditors, even tort judgment creditors.

Of course, the insured or his representative has the burden of persuasion on damages. He satisfies the burden, prima facie, by proving the amount of the excess tort judgment. The insurer may always show that in fact the insured was invulnerable or immune to the judgment, in whole or in part, because of his economic circumstances, or bankruptcy. The insured or his representative may then controvert the insurer's evidence.

There are other issues, namely, alleged errors on requested charges by Nationwide regarding the defense of failure to mitigate damages and the insured's contributory negligence.

Nationwide never pleaded by way of affirmative defense that Porter by not employing independent counsel to de-

fend the wrongful death and personal injury actions failed to mitigate damages (CPLR 3018; subd. [b]; cf. *McClelland* v. *Climax Housing Mills,* 252 N. Y. 347, 352-353; *Livant* v. *Livant,* 18 A D 2d 383, 384-385; 3 Weinstein-Korn-Miller N. Y. Civ. Prac., ¶¶ 3018-15 to 3018-18; Ann., Pleading—Tort—Mitigation of Damages, 75 ALR 2d 473, 479; 13 N. Y. Jur., Damages, § 26). Moreover, there is some doubt whether there is any duty, qualified or absolute, upon an insured to employ counsel after the insurer has wrongfully withdrawn (see *Carthage Stone Co.* v. *Travelers Ins.,* 274 Mo. 537; *In Re International Reinsurance Corp.,* 29 Del. Ch. 34, 78-79; cf. *Seward* v. *State Farm Mut. Auto. Ins. Co.,* 392 F. 2d 723, 725, n. 4 [C.A., 5th], *supra; Evans* v. *Continental Cas. Co.,* 40 Wn. 2d 614, 628; *American Sur. Co.* v. *Sutherland,* 35 F. Supp. 353, 358; but see *Fidelity & Cas. Co. of N. Y.* v. *Gault,* 196 F. 2d 329 [C.A., 5th]; *Southern Farm Bur., Cas. Ins. Co.* v. *Logan,* 238 Miss. 580, *supra;* 1 Long, *op. cit., supra,* § 5.29.) In any event, Nationwide never carried its burden of showing that damages would in fact have been mitigated if counsel had been retained by Porter, whether in whole or in part, and that it would have been reasonable for a person in Porter's financial condition, as Nationwide contends it was, to have done so. In the absence both of pleading and proving mitigation, the refusal to charge was proper.

On the other hand, it was wrong to refuse to charge on contributory negligence limited to the negligence cause of action. Receipt of notice of the insurer's withdrawal and the claimants' motion for inquests, and the December statement placing some of the blame for the accident upon the claimants, raised a question for the jury of Porter's contributory negligence. As matters eventuated on the trial, it made no difference because of the concurrent full recovery on the contract cause of action.

Accordingly, I dissent and vote to reverse and order a new trial.

Judges SCILEPPI and JASEN concur with Judge BERGAN; Chief Judge FULD concurs in an opinion; Judge BREITEL dissents in part and votes to reverse and grant a new trial in a separate opinion in which Judges BURKE and GIBSON concur.

Order reversed, etc.